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No. 611

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY, WASHINGTON, *Petitioner*

v.

FEDERAL POWER COMMISSION, and CITY OF SEATTLE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

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No.

PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY, WASHINGTON, *Petitioner*

v.

FEDERAL POWER COMMISSION, and CITY OF SEATTLE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Certiorari is respectfully sought to review the Court of Appeals affirmance of FPC orders which, on conflicting applications by two municipal corporations for a large new hydroelectric project in the State of Washington, granted Seattle a license and denied petitioner a license.

OPINIONS BELOW

The hearing examiner's decision (S.J.A. 225-309),[1] recommending grant of a license to Seattle, is reported at 26 FPC 61. FPC's first order (S.J.A. 218-225), granting Seattle the license, is reported at 26 FPC 54; its order denying rehearing (S.J.A. 311-321) is reported at 26 FPC 463. The Court of Appeals order of August 29, 1962 (Appendix A, *infra*), denying petitioner's motion to stay proceedings until the state courts definitively determined the state law question, is unreported. The Court of Appeals opinion of August 30, 1962 (Appendix B, *infra*), affirming FPC, is not yet reported.

The Supreme Court of Washington's July 12, 1962 opinion (Appendix C, *infra*) in the related case of *Beezer* v. *City of Seattle*, determining that the state courts have jurisdiction and directing the state court to proceed to determine the state law question, is reported at 160 Wash. Dec. 241, 373 P. 2d 796. Its October 2, 1962 opinion (Appendix D, *infra*) in the same case, denying Seattle's motion to dismiss, is reported at 160 Wash. Dec. 652, P. 2d .

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1), 28 U.S.C. §2101(e), and 16 U.S.C. §825*l*(b). On August 29, 1962, the Court of Appeals ordered (R. 359) that petitioner's motion to defer decision, or in

[1] "R." refers to the record as certified to this Court by the Court of Appeals. "J.A." and "S.J.A." refer respectively to the Joint Appendix and Supplemental Joint Appendix, as reproduced for the Court of Appeals; besides the copy included in the certified record, petitioner has filed nine copies thereof with this Court. "Tr." refers to the transcript of record certified by FPC to the Court of Appeals.

the alternative to remand, in the light of the Supreme Court of Washington's *Beezer* ruling, be denied. On August 30, 1962, the Court of Appeals rendered its opinion (R. 377-386) and judgment (R. 387). This petition is filed within ninety days.

QUESTIONS PRESENTED

Petitioner (a public utility district) and the City of Seattle are Washington municipal corporations. Each filed a license application with Federal Power Commission for a large new hydroelectric project on the Pend Oreille river in northeast Washington. The two projects are mutually exclusive, because a dam at either site will make the other useless: Petitioner already owns the two dam sites and the shorelands of the river above; and a Washington statute (Revised Code of Washington, § 35.84.030) prohibits a city from condemning any part of the electric system "belonging to or owned or operated by" a public utility district. Seattle cannot acquire petitioner's properties, indispensable to Seattle's project, unless Seattle may condemn them despite the express prohibition which this Washington statute imposes on Washington cities. Before the hearing began, petitioner moved for dismissal of Seattle's application because Seattle lacked legal capacity under Section 9(b) of the Federal Power Act, which requires that an applicant comply with state law with respect to bed and banks of the river. FPC, however, proceeded to hear the two conflicting applications. This was a contested proceeding in which the Federal Government had numerous direct interests, including substantial federal interests clearly within official responsibilities of Bureau of Mines, Bureau of Reclamation and other Interior Department agencies. Despite the conflict of interest laws, Seattle nevertheless

employed privately, and privately used and paid for, extensive services of regular full-time federal employees of the Bureau of Reclamation to prepare and present essential parts of Seattle's case in the contest before FPC. The questions presented are:

1. Whether, despite the Washington statute (§35.84.-030) which affirmatively prohibits the State's own cities from condemning electric properties of the State's own public utility districts, the Federal Power Act (Section 21) nevertheless should be interpreted—or constitutionally may be interpreted—as overriding the Washington statute and endowing Seattle with power to condemn such properties; and whether Seattle lacked legal capacity as an applicant under Section 9(b) of the Federal Power Act, if petitioner's specific properties, indispensable to Seattle's project, are properties which the Washington statute has forbidden Seattle to condemn and which Seattle cannot otherwise acquire; and in any event, whether the State of Washington's strong policy of regulating the relationship between its own municipal corporations should have been uprooted.

2. Whether it was error for the Court of Appeals to refuse to defer the federal proceedings to await the outcome of pending state court litigation wherein Washington's highest court had directed that a definitive state law determination be made as to whether petitioner's specific properties (indispensable to Seattle's project) do or do not come within the prohibitory Washington statute—such refusal to defer causing the Court of Appeals to make a premature decision of an important constitutional question and creating a needless, unseemly and serious conflict with the Washington state courts.

3. Whether, in a contested federal administrative proceeding in which the Federal Government has exten-

sive, direct and substantial interests, the federal conflict of interest statutes and policies permit a contesting applicant (Seattle) to use the services, the work product and the testimony of regular full-time Federal Government employees whose services the applicant has privately retained and paid for to build up and present essential parts of the applicant's case; or whether instead the federal conflict of interest statutes and policies require that (at the minimum) this fundamental portion of Seattle's case be excluded.[2]

STATUTES INVOLVED

The pertinent statutes are in Appendix E, *infra*.

STATEMENT OF THE CASE

This case is in the courts on review of a contested federal licensing proceeding. It involves important questions of statutory interpretation, of constitutional law, and of legal and judicial policy, concerning the respective powers of the Federal Government and the States, in connection with a State's sovereign power to control the relationship between its own municipal corporations. It also involves important questions as to the scope and application of federal conflict of interest laws and policies.

In 1953, while petitioner was constructing a hydroelectric project on the Pend Oreille river at a site known as Box Canyon (18 miles from where that Columbia river tributary crosses the Canadian border), petitioner purchased the shorelands extending from

[2] A subsidiary question, reserved for argument if certiorari is granted, is whether FPC erred in denying petitioner's applications to subpoena two Interior Department officials for the purpose of establishing on the record all facts (including Seattle's *ex parte* representations to the Interior Department) concerning Seattle's conflict of interest violations.

Box Canyon almost to the border.[3] This purchase included the two dam sites, a mile apart, known as Boundary and Z Canyon. Petitioner also acquired detailed plans for a hydroelectric development at Z Canyon, whose rock foundations had been fully tested and explored. Petitioner's purpose was to construct a dam to be operated in coordination with petitioner's Box Canyon project and thus complete full development of the water resources of the Pend Oreille river. Despite these facts, in October 1953 Seattle filed application with FPC for a preliminary permit covering the Boundary site.

Thereafter, petitioner and Seattle each filed conflicting applications with FPC for a license. Petitioner's Z Canyon project and Seattle's Boundary project are mutually exclusive, because a dam at either site will make the other useless.

FPC consolidated the applications for hearing. Extensive hearings, held before an examiner, dealt largely with the comparative merits of the two projects in the light of Federal Power Act criteria. One of the main issues in the hearing was the possible danger of catastrophic flooding whereby Seattle's project would destroy life and property and would seriously jeopardize the future development of vast lead and zinc deposits having strategic importance. It was this mine damage problem which had led the Interior Department

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[3] Petitioner is a municipal corporation created in 1936 by the citizens of Pend Oreille County, pursuant to a Washington statute authorizing establishment of public utility districts "to conserve the water and power resources of the State of Washington for the benefit of the people thereof, and to supply public utility service, including water and electricity for all uses." Washington Laws of 1931, c. 1, §§ 1 and 2 (Revised Code of Washington, § 54.04.020).

to oppose Seattle's project as early as 1954 (J.A. 144), after Seattle applied to FPC for a preliminary permit.

The examiner recommended (S.J.A. 225-309) a license be issued to Seattle and denied to petitioner. By order of July 10, 1961 (S.J.A. 218-225), FPC modified and adopted the examiner's decision, thus granting Seattle a license and denying petitioner a license. On application for rehearing, FPC made one modification, not material here, and denied rehearing (S.J.A. 311-321). Petitioner filed a timely petition for review in the Court of Appeals, which now has affirmed FPC (Appendix B, *infra*; R. 377-387).

Two groups of issues which compellingly call for full review by this Court have arisen in the course of the proceedings below.

Federal-State Conflict as to Seattle's Lack of Capacity. Before the hearings began, petitioner moved (Tr. 20279-20297) to dismiss Seattle's application because of Seattle's inability to comply with Section 9(b) of the Federal Power Act, 16 U.S.C. §802(b), [p. E-2, *infra*]. Petitioner's grounds were that the properties owned by petitioner included bed and banks of the Pend Oreille river which are indispensable to Seattle's project; that Seattle could not acquire those properties from petitioner by purchase; that the Washington statute, Revised Code of Washington, §35.84.030 [p. E-3, *infra*], affirmatively prohibits a city from condemning "the electric power and light plant or electric system, or any part thereof, belonging to or owned or operated . . . by a public utility district";[4] that the

[4] Washington also has a statute which, reciprocally, prohibits a public utility district from condemning a "public utility owned by a city". Revised Code of Washington, § 54.16.020.

properties in question are a part of petitioner's electric system within the meaning of this Washington statute and thus are shielded from condemnation by Seattle; and that Seattle hence could not comply with the Section 9(h) requirement that an applicant submit satisfactory evidence of compliance with state law "with respect to bed and banks".

FPC refused at this stage to pass upon the merits of petitioner's motion, deferring action on it until after the examiner heard the case (S.J.A. 227). The examiner in his decision rejected petitioner's contentions. He held (S.J.A. 227-229) that although under existing circumstances Seattle's acquisition of petitioner's properties was impossible without condemnation, nevertheless if Seattle received a federal license, then Seattle's power to take petitioner's properties by eminent domain was established by this Court's decision in *City of Tacoma* v. *Taxpayers*, 357 U.S. 320, regardless of whether the prohibitory Washington statute (§35.84.030) covers these particular properties.

On this issue FPC's first order sustained the examiner without further comment (S.J.A. 219-220). In its order denying rehearing FPC held: "We need not decide in this proceeding whether Seattle is prohibited by state law from acquiring the particular properties of [petitioner] in question. In our opinion Seattle's right to acquire these properties by the exercise of the power of eminent domain under Section 21 of the Federal Power Act is well established" (S.J.A. 316).

In the Court of Appeals the briefs called attention to a taxpayer's suit, *Beezer* v. *City of Seattle*, which meanwhile had been instituted in the Washington state courts. The suit (in which petitioner had intervened) sought a declaratory judgment declaring that, because

of the Washington prohibitory statute (§35.84.030), Seattle's condemnation of petitioner's properties would be illegal and void. The *Beezer* case was then on appeal to the Supreme Court of Washington, the trial court having dismissed the complaint as an "impermissible collateral attack" on the federal proceeding.

Prior to oral argument in the Court of Appeals petitioner, relying on this Court's decisions concerning the "abstention" doctrine, moved (R. 336-344) for a stay of Court of Appeals proceedings pending the Supreme Court of Washington's determining in *Beezer* the Washington statute's interpretation and applicability. Petitioner's motion was denied (R. 345).

On July 12, 1962, before decision by the Court of Appeals, the Supreme Court of Washington decided the *Beezer* appeal (Appendix C, *infra*; R. 360-376). It reversed the summary dismissal of the complaint and directed the state trial court to determine whether these properties of petitioner are covered by the Washington statute (§35.84.030) and under state law are shielded from condemnation by a city. The Washington Supreme Court characterized the issue as "another and, as yet, unexplored facet of the obligation of a municipal corporation, existing under and by virtue of the laws of the state of Washington, to comply with the laws of that state" (p. C-1, *infra*). It held that the Washington statute prohibiting Seattle from condemning electric properties of public utility districts "is clearly a declaration of the public policy of the state, dating back thirty years, and is in no sense an attempt to exercise a veto" over federally licensed projects (p. C-4, *infra*); and that the state courts "should not hesitate to proceed" with the interpretation and application of the state statute (p. C-5, *infra*).

Petitioner promptly, on July 16, 1962, submitted the *Beezer* decision to the Court of Appeals and moved (R. 350-358) that the Court of Appeals either defer decision until final disposition of the state court case in the light of the *Beezer* opinion, or in the alternative remand the proceeding to FPC for reconsideration in the light of *Beezer*. On August 29, 1962, the Court of Appeals (Appendix A, *infra*; R. 359) granted petitioner leave to file the *Beezer* opinion, but denied the rest of petitioner's motion. The next day, in affirming FPC (Appendix B, *infra*; R. 377-387), the Court of Appeals held that this Court's decision in *City of Tacoma* v. *Taxpayers*, 357 U.S. 320, "makes it clear that the State statute here involved, even if according to its own terms it is applicable, cannot make it impossible for Seattle as a federal licensee to condemn under the federal statute" (p. B-9, *infra*).

The Court of Appeals also said (p. B-9, *infra*) "it does not appear that the land owned by [petitioner] and needed by Seattle is a part of the former's electric plant or system which the Washington statute protects from condemnation by a city or town". This comment seems astonishing since the question of state law was one which FPC had expressly refused to decide or make findings on (p. 8, *supra*); the record furnished no grounds for deciding the state law question adversely to petitioner; and the Court of Appeals wholly ignored and disregarded the *Beezer* opinion of the Supreme Court of Washington, which had just directed the state trial court to make a definitive determination of this state law question.

After the Court of Appeals decision, Seattle moved in the Supreme Court of Washington to dismiss the *Beezer* appeal and action, claiming that the state court

case had been rendered moot by the Court of Appeals decision. With a further opinion (Appendix D, *infra*), the Supreme Court of Washington denied this motion (it also denied Seattle's petition for rehearing). Trial in the state court was delayed, however, by Seattle's then filing in the Supreme Court of Washington a motion for a stay until final action by this Court. On November 19, 1962, the Supreme Court of Washington denied the stay.

Issues Arising out of Seattle's Conflict of Interest Violations. The federal conflict of interest laws and policies prohibit the private employment of federal employees for pay in proceedings in which the United States has an interest (18 U.S.C. §281 and §2; p. E-1, *infra*). In this proceeding the Government's interests are direct and unusually substantial. Among others, the record shows in considerable detail a series of positions taken, and views expressed, and federal interests being watched over, by the Interior Department and its constituent agencies—Bureau of Mines, Geological Survey, Fish and Wildlife Service, and Bureau of Reclamation (J.A. 143-151, 50-52, 164-166).[5]

The record shows that the Interior Department by letters to FPC repeatedly opposed Seattle's Boundary project because of the danger to mining operations (J.A. 143-145, 164-166). During the course of the hearings three witnesses—two from Bureau of Mines and one from Geological Survey—were furnished by the Interior Department (J.A. 148) and presented data showing the strategic importance of these vast lead and zinc deposits to the nation's future national security,

[5] The nature of the specific interests of Bureau of Reclamation in this proceeding is summarized by documents at J.A. 50-52, 143, 149, 165.

and the hazard which would result from construction of a high dam in the area (Tr. 8233-8357, 15755-15899, 15902-16282). At the end of the hearing the Interior Department wrote a final letter opposing the grant of a license in view of the mine damage problem (J.A. 164-166).

In addition, the record shows the positions taken by the Army's Office of the Chief of Engineers on navigation aspects of the two competing applications (J.A. 139-140), and by the Agriculture Department's Forest Service concerning license conditions to protect Colville National Forest (J.A. 141-142). And Congress has placed in FPC itself the responsibility for protecting federal interests under the Federal Power Act, 16 U.S.C. §791a-823, including the statutory command that FPC act "in the public interest" in development of water resources, 16 U.S.C. §§800(a), 803(a), and the specific pecuniary provision directing FPC to fix charges a licensee will be required to pay the United States, 16 U.S.C. §803.

The Federal Government's direct and substantial interests in such FPC proceedings—and the official responsibilities of the federal agencies, including Bureau of Reclamation and other Interior Department units, in protecting these Government interests—are facts exceptionally well known. Indeed, in this particular case Seattle and FPC had known as early as 1954 that the Interior Department opposed Seattle's Boundary project (J.A. 144; see pp. 6-7, *supra*). Nevertheless, through a firm called Savage and Associates, Seattle proceeded to make private arrangements to retain the services of, and to use and privately pay for the work of, Ireal A. Winter and more than twenty

other regular full-time Bureau of Reclamation employees (J.A. 32-40, 81-84, 200-201, 206).

Winter, an engineer, had been continuously employed for about twenty-five years, since 1933, as a regular full-time employee of the Interior Department's Bureau of Reclamation, and was Chief of the Bureau of Reclamation's Hydraulic Machinery Branch at the time he performed this work for Seattle. Seattle privately retained and paid Winter to perform this work and to prepare testimony as one of the principal expert witnesses in presenting essential parts of Seattle's case to FPC. He testified that he was employed to determine the power potentialities of this reach of the Pend Oreille River, considering the costs and the engineering feasibility of the sites which might be selected (J.A. 54); that he had about ten other Bureau of Reclamation employees working under his supervision on Seattle's project (J.A. 34-35). He supervised preparation of preliminary layouts of several alternates to determine costs and engineering feasibility (J.A. 54); he supervised preparation of drawings covering the power features of Seattle's project (J.A. 34, 55), engineering design of the power plant (J.A. 55-56), the powerhouse structure, the generators and other equipment to be installed at the project and the transmission plant (Tr. 857-869). Winter presented these materials in his testimony, and he took responsibility for Seattle's cost estimates for the project's power features (J.A. 58-60).[6]

[6] Extraordinary circumstances surrounded Winter's appearance as a witness. About three months before the hearings opened, the Bureau of Reclamation, because of its concern over conflicts of interest, refused Winter's request that he be allowed to appear as Seattle's witness (J.A. 18-19, 202-203). Thereafter Seattle made *ex parte* representations to the Interior Department, saying

Winter also testified that in his opinion Seattle's Boundary project, as a power site, is the best site for developing the full potentiality of this stretch of the Pend Oreille river (Tr. 869; J.A. 57-58). In addition, Winter participated in preparing materials used by other Seattle witnesses, and helped develop data for Seattle's cross-examination of petitioner's witnesses (J.A. 73). Another group of regular Bureau of Reclamation employees, whose services were likewise privately paid for by Seattle (J.A. 81-84), prepared the designs, and assisted in the cost estimates, for the dam and related structures (Tr. 1790; Tr. 1792-1802).

To all this, petitioner strenuously objected at the outset and throughout the hearings. Petitioner urged that Seattle's course of conduct involved serious violation of federal conflict of interest laws and policies—particularly in the light of 18 U.S.C. §281 (p. E-1, *infra*), which prohibits federal employees from directly or indirectly receiving or agreeing to receive compensa-

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"that their case was built around Mr. Winter's testimony and that it would be a very expensive and time-consuming thing to start over" (J.A. 203, 50). As a result, the Bureau granted Winter permission to testify (J.A. 203). When at the outset of the hearings petitioner, having just seen Winter's prepared testimony, questioned the propriety of Seattle's using Winter as a witness or using any other evidence based on Winter's work (J.A. 6-10), the Commissioner of Reclamation revoked Winter's authorization to testify (J.A. 42-43). Seattle then by *ex parte* action obtained from the examiner a subpoena which it served on its witness Winter (Tr. 808-809, 824, 20415-20416; J.A. 29); the examiner quashed the subpoena (Tr. 816, 832-833) and then reinstated it when a new letter was produced from the Interior Department stating that, in view of Interior's policy to permit its employees to testify in any legal or regulatory proceedings, Winter had permission to testify (J.A. 49-53). A subsequent Interior Department letter stressed that the question whether Winter's testimony should be received and utilized was a matter it thought FPC, not Interior, should determine (J.A. 88-90).

tion for any services rendered, in relation to any proceeding, controversy or other matter in which the United States is directly or indirectly interested, before any department, agency or officer; and 18 U.S.C. §2 (p. E-1, *infra*), which provides that whoever aids, abets, counsels, commands, induces or procures the commission of an offense against the United States is punishable as a principal. In view of these strong federal statutes and policies, petitioner contended that any "clearance" which Bureau of Reclamation employees may have obtained to perform outside work could not give sanction to Seattle's use of such tainted evidence in this contested licensing proceeding. Petitioner's position was that, as a minimum, Winter's testimony and the other Seattle evidence based on the work of the Bureau of Reclamation employees should be excluded; and further, that Seattle's conduct disqualified Seattle as an applicant.

The examiner overruled all petitioner's objections (J.A. 36; Tr. 748-757; Tr. 816; J.A. 56-57; S.J.A. 229-233).[7] Moreover, his decision shows that the examiner, deeming Winter's qualifications "most impressive" (S.J.A. 230-231), relied extensively on the work Seattle had paid Winter and the other Bureau of Reclamation employees to perform. FPC similarly rejected petitioner's contentions on the conflict of interest issues (S.J.A. 219-220; S.J.A. 316-317).

In affirming, the Court of Appeals held that the grant of a license to Seattle was not required to be set aside

[7] The examiner also denied petitioner's applications to subpoena two Interior Department officials for the purpose of establishing on the record all the facts (including Seattle's *ex parte* representations to the Interior Department) concerning Seattle's conflict of interest violations (Tr. 888; J.A. 61-62; J.A. 214-215; Tr. 1584-1593; Tr. 2044-2049).

because of "a technical violation" of the conflict of interest statutes which may have occurred (pp. B-4 and B-5, *infra*). Emphasizing that "no corrupt or venal motive is shown on the part of Seattle or the Bureau of Reclamation engineers", and that the Government had not instituted any criminal prosecution, the Court of Appeals held this was not "the 'influence peddling' at which §281 was aimed."

REASONS FOR GRANTING THE WRIT

A. FEDERAL-STATE CONFLICT AS TO SEATTLE'S LACK OF CAPACITY

1. Conflict With Supreme Court of Washington

The Court of Appeals decision establishes a direct conflict between the Court of Appeals and the highest court of the State of Washington as to the impact of the Federal Power Act upon the State's control over the relationship between its own municipal corporations. That conflict involves grave and far-reaching issues concerning federal-state relationships. They are issues which have not heretofore been decided by this Court, and this Court should review and resolve them.

As stated (p. 10, *supra*), the Court of Appeals decided that the Federal Power Act's eminent domain provision endows Seattle with the power as a licensee to condemn electric properties of state public utility districts even though for thirty years the State by statute has forbidden its cities to exercise such power.[8] Squarely in conflict with this are two decisions of the Supreme Court of Washington, in the recent case of *Beezer* v. *City of Seattle* (Appendix C and Appendix D, *infra*; see pp. 8-11, *supra*) and in *City of Tacoma* v. *Taxpayers*, 49 Wash. 2d 781, 307 P. 2d 567 (1957).

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[8] As appears (p. 22, *infra*), this Washington statute is in no sense a "veto" law which prevents construction of a dam in a navigable river.

In *Beezer* the Supreme Court of Washington not only adhered to its earlier ruling in *Tacoma* that the Federal Power Act does not and cannot confer on a Washington municipality authority to condemn property of a particular type when the municipality lacks an express authorization under state law to make such a condemnation; but it also pointed out that here there exists an express prohibition against condemnation.

The Supreme Court of Washington ruled in *Tacoma* (49 Wash. 2d at 800, 307 P. 2d at 577):

> "The Federal government may not confer corporate capacity upon local units of government beyond the capacity given them by their creator, and the Federal Power Act, as we read it, does not purport to do so."

Although on writ of certiorari this Court reversed the judgment, *City of Tacoma* v. *Taxpayers*, 357 U.S. 320, the reversal rested solely on the ground of res judicata. This Court held that, in the light of proceedings in the Ninth Circuit several years before (*State of Washington Dept. of Game* v. *Federal Power Comm'n*, 207 F. 2d 391, certiorari denied, 347 U.S. 936), the State of Washington and its citizens were foreclosed by the Court of Appeals judgment from litigating further Tacoma's power and authority to proceed under its license. Accordingly this Court has neither approved nor disapproved the ruling and interpretation by the Supreme Court of Washington on the merits in *Tacoma*, so that the ruling and interpretation remain unimpaired. Thus there now exists a direct conflict between the law as declared by the Supreme Court of Washington and the present decision of the Court of Appeals.

The Court of Appeals did not agree with petitioner's analysis of this Court's decision in *Tacoma*—and we contend this was serious error (p. 19, *infra*). In any event it is clear that the Supreme Court of Washington, like petitioner, takes the opposite view, as shown by *Beezer*; there it held unequivocally that its *Tacoma* decision had not been the subject of any ruling on the merits by this Court in *Tacoma*.[9]

Moreover, in *Beezer* the Supreme Court of Washington has pointed out that Seattle not merely lacks express authority, but instead is faced with an affirmative statutory prohibition of long standing in its charter (p. C-3, *infra*):

> "We do not regard anything actually decided in the Cowlitz [*Tacoma*] litigation as decisive of the present case. In the first place, it was conceded that when the city of Tacoma received its license to proceed with the Cowlitz project and construct the necessary dams, there was nothing limiting its authority so to do. Here, the city of Seattle, at the time it applied for its license to proceed with the Boundary project, had a known and express limitation on its power, *i.e.*, it could not condemn
>
> > '. . . the electric power and light plant or electric system, or any part thereof, belonging to or owned or operated . . . by a public utility district' ".

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[9] See pp. C-3 and C-4, *infra*: "it has been, and is, our view that the Supreme Court of the United States in *City of Tacoma* v. *Taxpayers* . . . did not pass upon the proposition which we deemed decisive . . . *i.e.*, that the Federal government may not confer powers upon local units of government created by the state beyond the capacity given them by their creator. The Supreme Court of the United States reversed our decision in that case on the basis of res judicata, . . .".

Seattle's lack of capacity under such circumstances receives further emphasis from what this Court said in *Dallemagne* v. *Moisan*, 197 U.S. 169, 174:

> "It has long been held that power may be conferred upon a state officer, as such, to execute a duty imposed under an Act of Congress, and the officer may execute the same, unless its execution is prohibited by the Constitution or legislation of the State."

2. Misinterpretation of This Court's Tacoma Decision

Apart from the conflict with the Supreme Court of Washington, the Court of Appeals on this point based its decision on serious misinterpretation and misapplication of this Court's ruling in *City of Tacoma* v. *Taxpayers, supra.* The Court of Appeals held (p. B-9, *infra*) that this Court's *Tacoma* ruling "makes it clear that the state statute, even if according to its own terms it is applicable, cannot make it impossible for Seattle as a federal licensee to condemn under the federal statute." But as already shown (pp. 17-18, *supra*), this Court rested *Tacoma* solely on res judicata grounds, without in any way intimating a view as to the merits of the vital state-federal question involved. In deciding that *Tacoma* stands for exactly the opposite, the Court of Appeals (like FPC) fundamentally misinterpreted *Tacoma* on a matter of lasting significance to federal-state relationships. Such misinterpretation calls for review and correction by this Court.

3. Importance of Federal-State Conflict Created by Disregard of Constitutional and Congressional Standards

The Court of Appeals decision disregards the clear intent of Congress that FPC shall not infringe on the sovereign authority of the States. This decision creates a basic federal-state conflict of grave constitu-

tional and statutory dimensions, which this Court, in any event, should review.

On at least two occasions in recent years this Court has extensively considered the Federal Power Act's history and objectives and has emphasized the purpose of Congress not to infringe on the sovereign rights of the States. *First Iowa Coop.* v. *Power Comm'n*, 328 U.S. 152;[10] *F.P.C.* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239, 251-253.

This Court has repeatedly declared and sustained the sovereign power of a State to control the activities of its own municipal corporations. *Hunter* v. *Pittsburgh*, 207 U.S. 161, 178-179; *Pawhuska* v. *Pawhuska Oil Co.*, 250 U.S. 394, 397-399; *Williams* v. *Mayor*, 289 U.S. 36, 40. Subject to the narrow exceptions necessary to prevent federal constitutional guaranties from being "manipulated out of existence", *Gomillion* v. *Lightfoot*, 364 U.S. 339, 345, it is the State and not the Federal Government which determines and controls what powers shall be conferred on, and what powers shall be withheld from, the State's municipalities.

In deciding that the Federal Power Act overrides the Washington statute which forbids Washington cities from condemning electric properties of public utility districts, the Court of Appeals thus overturned the repeated mandate of this Court. In so doing, the

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[10] In *First Iowa* this Court, in discussing the duality of control for which Congress provided, said (328 U.S. at 167-168): "In the Federal Power Act there is a separation of those subjects which remain under the jurisdiction of the states from those subjects which the Constitution delegates to the United States and over which Congress vests the Federal Power Commission with authority to act. To the extent of this separation, the Act establishes a dual system of control. The duality of control consists merely of the division of the common enterprise between two cooperating agencies of Government, each with final authority in its own jurisdiction."

Court of Appeals has totally rejected the principle, so often applied by this Court, that Congressional enactments are to be interpreted in a manner which will avoid serious doubts as to their constitutionality. The Court of Appeals likewise has disregarded this Court's strong admonition that "In a dual system of government in which, under the Constitution, the States are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Parker* v. *Brown*, 317 U.S. 341, 351; see also *Penn Dairies* v. *Milk Control Comm'n.*, 318 U.S. 261, 275; *Huron Cement Co.* v. *Detroit*, 362 U.S. 440, 443.

Such considerations underscore the necessity for granting the writ to give full review to the constitutional, statutory and policy implications of a decision which, if allowed to stand, would permit FPC to graft onto this shackled municipal corporation a federal power enabling Seattle to defy its creator and violate an express legislative prohibition on its charter. Nothing in the legislative history of the Federal Power Act provides any justification for such an extraordinary result. The fact is FPC has refused to determine the qualifications of the applicant under state law in the manner that Congress intended by Section 9(b) of the Federal Power Act.

The *Beezer* opinion (Appendix C, *infra*) manifests the gravity with which these issues are regarded by the highest court of the State of Washington. Washington, by legislation of long standing, has put into effect a state-wide policy intended to prevent its cities and its public utility districts each from using the power of eminent domain to interfere with the electric development and operations of the other (p. 7, *supra*). But the Court of Appeals decision would permit FPC

to uproot the State's internal regulation of the relationship between its two different types of municipal corporations—despite the fact that any applicant other than a city would not be disabled by this statute and could proceed to qualify as an applicant and could exercise all the powers conferred by the Federal Power Act. As the Supreme Court of Washington stated, the State law here "is in no sense an attempt to exercise a veto over said project" (p. C-4, *infra*).[11]

For the State of Washington—and for any other State which has imposed or in the future decides to impose such restrictions on its own subdivisions[12]—the Court of Appeals decision, unless reversed, would accomplish total defeat of the State's policy, though such policy is not in conflict with the objectives of the Federal Power Act. It is in the public interest that a decision fraught with such exceptional consequences should be fully reviewed by this Court.

4. Improper Disregard of "Abstention" Doctrine

The Court of Appeals, by refusing to defer decision until the state courts in *Beezer* could determine from the evidence whether petitioner's properties are such properties as the legislature intended to protect

[11] Thus the present statute is entirely different from the "veto" statutes involved in *First Iowa*, *supra*, and in the *Tacoma* litigation when it was before the Ninth Circuit in *State of Washington Dept. of Game* v. *Federal Power Comm'n*, 207 F. 2d 391, certiorari denied, 347 U.S. 936.

[12] Thus California has a reciprocal statutory prohibition directing that "property appropriated to the use of any county, city and county, incorporated city or town, or municipal water district, may not be taken by any other county, city and county, incorporated city or town, or municipal water district, while such property is so appropriated and used for the public purposes for which it has been so appropriated." California Code of Civil Procedure § 1240.3; see *County of Marin* v. *Superior Court*, 53 Cal. 2d 633, 349 P. 2d 526 (1960).

against condemnation (pp. 9-10, *supra*), has needlessly precipitated a constitutional conflict as to whether the federal or state sovereignty shall control the eminent domain powers of state subdivisions. The Court of Appeals action not only is in conflict with this Court's long line of decisions that the federal courts should abstain from reaching constitutional questions until after pertinent state law questions have been decided by the state courts, *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220, and cases cited, but it also conflicts with the Supreme Court of Washington's decision in *Beezer*.

In *Beezer*, the Supreme Court of Washington held that the controversy in the state court is whether petitioner's property, "which the city of Seattle concedes it intends to condemn, is within the statutory prohibition"; that "neither the Federal Power Commission nor the federal courts can make a conclusive determination on that point"; and that "We are here concerned with the interpretation and application of state law, and our courts should not hesitate to proceed with that interpretation and application" (pp. C-4 and C-5, *infra*).

A decision by the state court in *Beezer* will bring a definitive determination as to whether petitioner's specific properties come within the terms of the Washington statute, and hence a determination of the precise context in which these grave constitutional, statutory and policy issues must be considered. "One policy served by that practice is that of not passing on constitutional questions in situations where an authoritative interpretation of state law may avoid the constitutional issues. . . . Another policy served by that practice is the avoidance of abstract, hypothetical issues." *Government Employees* v. *Windsor*, 353 U.S. 364, 366.

In the circumstances actually presented and in the light of the rulings of this Court, the Court of Appeals should (as petitioner urged—pp. 9-10, *supra*) have availed itself of this easy opportunity to have the benefit of a definitive state court determination. The Court of Appeals' indifference to the state law and policy is manifested not only by its failure to obtain such a determination, but also by its intruding an astonishing speculative comment (p. 10, *supra*) concerning the state law question which the Supreme Court of Washington in *Beezer* had just directed the state trial court to determine definitively, and indeed by its total disregard of the *Beezer* decision other than to direct the clerk to receive the opinion for filing (Appendix A, *infra*).

As this Court said recently in *Martin* v. *Creasy*, 360 U.S. 219, 224:

> "Reflected among the concerns which have traditionally counseled a federal court to stay its hand are the desirability of avoiding unseemly conflict between two sovereignties, the unnecessary impairment of state functions, and the premature determination of constitutional questions. All those factors are present here."

These considerations should have prevailed in this case. See also *United Gas Co.* v. *Ideal Cement Co.*, 369 U.S. 134.

B. VIOLATIONS OF FEDERAL CONFLICT OF INTEREST LAW AND POLICY

1. Importance of Review by This Court

The conflict of interest issues (pp. 11-16, *supra*) raise a question of substantial importance to the integrity of governmental processes. It is a question which has not been, but should be, decided by this Court.

This question is whether, in a contested licensing proceeding in which the Federal Government is di-

rectly and vitally interested, a federal regulatory agency does or does not have a duty to prevent an applicant from basing its evidentiary case on testimony and work product obtained by the applicant's privately retaining and paying for the services of regular full-time federal employees. The issue is especially acute because here the federal employees (Seattle's witness Winter and the more than twenty others from the United States Bureau of Reclamation) were, while rendering the services for pay to the applicant, full-time employees of the very Government Department which opposed Seattle's application and was responsible for protecting numerous Government interests at stake in the licensing proceeding.

The decision of this question affects the proceedings of all federal regulatory agencies, and the rights and obligations of the parties in contests before such agencies. It goes to the heart of the standards of conduct permissible for federal employees generally and for persons who deal with them.

The federal policy is established by 18 U.S.C. § 281 (p. E-1, *infra*)[13]—one of several conflict of interest statutes "designed to prohibit government officials from engaging in conduct that might be inimical to the best interests of the general public". *United States* v. *Mississippi Valley Co.*, 364 U.S. 520, 548. The Bureau of Reclamation employees' activities, undertaken here at Seattle's behest, were in flagrant violation of

[13] The need for full review by this Court is made even more urgent by the recent revision of the conflict of interest laws as reflected in P.L. 87-849, approved October 23, 1962, and effective ninety days thereafter (76 Stat. 1119). Section 203 of P.L. 87-849 continues the substance of these prohibitions in full effect with respect to regular federal employees; the violations occurring here would equally be violations under P.L. 87-849. Accordingly, the Court of Appeals decision would thwart the purposes of this new statute just as effectively as it thwarts the purposes of the present statute.

Section 281's strong policy prohibiting federal employees from receiving compensation, or agreeing to receive compensation, for services in relation to any proceeding or matter in which the United States is directly or indirectly interested. *Burton* v. *United States*, 202 U.S. 344. Indeed, this "is the very conduct which section 281 was enacted to prevent"—as was so firmly stated in an Opinion of the Attorney General rendered to the President early this year (42 Op.Atty. Gen. No. 6, dated January 31, 1962, printed slip opinion, p. 11):

> "The full-time employee draws his basic income for his services from the Government and any outside employment, if permitted at all by regulation, is incidental and exceptional. The impropriety of such an employee's acceptance of compensation for private services before any Government department or agency springs instantly to mind. This factor was emphasized by Senator Trumbull in the statement already quoted. It is offensive to good morals and to common conceptions of what is ethical. It is the very conduct which section 281 was enacted to prevent."

And 18 U.S.C. § 2 (p. E-1, *infra*) underscores the fact that Seattle's course of conduct, equally with that of the Bureau of Reclamation employees, unmistakably violated this federal policy. *May* v. *United States*, 175 F. 2d 994, 1004-1005 (D.C. Cir.), certiorari denied, 338 U.S. 830.[14]

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[14] In the *May* case this was amply demonstrated by the Government—first in the Government's brief in the Court of Appeals (pp. 59-60), which persuaded the Court of Appeals that under the statute which now is § 281 the convictions of the two Garssons for paying compensation to Congressman May should be affirmed; and again, in the Government's brief filed in this Court (pp. 23-27, Nos. 100-102, 1949 Term) in opposition to the ensuing petitions for certiorari.

Accordingly, the issue is whether a federal regulatory agency is permitted to reject this federal policy totally, as FPC did here. This involves not only injury to the public interest, but also infringement of basic rights of contesting parties, particularly when the prevailing contestant's case is the product of such serious violations of the conflict of interest laws and policy. The issue calls for full review by this Court even more compellingly than did the *Dixon-Yates* case, *United States* v. *Mississippi Valley Co.*, 364 U.S. 520, where this Court granted certiorari because the conflict of interest issue presented by the company's claim for reimbursement "has a far-reaching significance in the area of public employment and involves fundamental questions relating to the standards of conduct which should govern those who represent the Government in its business dealings." (364 U.S. at 523).

2. Refusal to Follow Principles of Dixon-Yates Decision

The Court of Appeals has refused to follow and apply principles which this Court found controlling in the *Dixon-Yates* case, *United States* v. *Mississippi Valley Co.*, 364 U.S. 520, in at least two important respects.

The Court of Appeals relied on the fact that the Government had not instituted any criminal prosecution (p. B-4, *infra*). But *Dixon-Yates* makes clear that such fact confers no immunity against proper sanctions being imposed for the wrongful course of conduct pursued. 364 U.S. at 563.

The Court of Appeals apparently thought it decisive that "no corrupt or venal motive is shown on the part of Seattle or the Bureau of Reclamation engineers" (p. B-5, *infra*). But as *Dixon-Yates* established with respect to 18 U.S.C. § 434 (a companion conflict of interest statute), it is the "inherent difficulty in detecting

corruption" which requires that the sanction be imposed even if the party involved "ostensibly appears entirely innocent". 364 U.S. at 565. Mr. Justice Holmes put the matter similarly for the Court in *Hazelton* v. *Sheckells*, 202 U.S. 71, 79 (invalidating contracts with fees contingent on obtaining Congressional action), saying that the objection "rests in their tendency, not in what was done in the particular case. . . . The court will not inquire what was done. If that should be improper it probably would be hidden and would not appear". See also *Tool Co.* v. *Norris*, 2 Wall. 45, 54-55.

3. Need for Correcting Serious Departure from Congressional Purposes

The Court of Appeals has so effectively thwarted Congress' purposes on a matter of public importance that an exercise of this Court's supervisory jurisdiction is called for. What Congress established as an essential code of conduct, the Court of Appeals has minimized beyond recognition. By characterizing and excusing these occurrences as merely "a technical violation" of the conflict of interest laws (pp. B-4 and B-5, *infra*), the Court of Appeals has manifested exceptional insensitiveness to the legislative objectives.

Its disregard for the statutory standards likewise led the Court of Appeals to conclude that what happened here was not "the 'influence peddling' at which § 281 was aimed" (p. B-5, *infra*). But the scope of Section 281 is by no means limited to situations where "influence peddling" is proven or provable—as the Attorney General's recent opinion shows (p. 26, *supra*) and as the statute's terms make clear. Instead Section 281 establishes prohibited areas of conduct so that in the particular case no inquiry need be made as to whether, or how much, the outcome was affected by "influence peddling".

More than fifty years ago this Court said "The scope of the statute [now Section 281] is, in our judgment, most manifest, and the nature of the offense denounced cannot well be made clearer than it has been made by the words used to express the legislative intent". *Burton* v. *United States*, 202 U.S. 344, 370. The unequivocal prohibitions surely should make it impossible for any license applicant—and particularly one confronted with Interior Department opposition—privately to retain and pay for services of regular full-time Interior Department employees who at the same time continue their Government service. The broad statutory policy plainly makes it unnecessary to ascertain whether such an applicant was or was not acting corruptly, or acting with a hope to soften or dilute the Interior Department's opposition.

Here the violations were neither "technical" nor trivial. Winter's position was Chief of Hydraulics Machinery Branch of the Bureau of Reclamation; the other Bureau employees who worked on Seattle's projects were likewise Government experts in their respective fields. No one now can say how extensively their participation affected the examiner (who did state he found Winter "most impressive"—p. 15, *supra*), or the FPC staff, or others in FPC, on questions of cost, power production, financial feasibility, mine damage, and other elements of the two competing applications on which comparison was being made. No one now can say how this contested case would have been decided by FPC if Winter and the other Bureau of Reclamation employees had not been working for Seattle—or if their tainted evidence, so vital to Seattle's case, had been wholly excluded from the record.

Analogy will emphasize the enormity of the error and the need for this Court's review. Suppose, for

example, that the Federal Trade Commission's chief economist were to hire himself out for pay to a natural gas company to prepare, in after-hours, economic studies which the gas company intended to use in an FPC acquisition proceeding being contested by the United States and others on the ground that antitrust violations were involved (compare *California* v. *Fed. Power Comm'n*, 369 U.S. 482). Should any court sustain FPC if FPC approved the acquisition on the basis of testimony which the gas company had paid this federal employee to develop and present? Should any court allow the Civil Aeronautics Board to award a contested route to an airline on the basis of testimony by a Congressman whom the airline had paid to develop and present an evidentiary case in support of the airline's application? Compare *Burton* v. *United States*, 202 U.S. 344.

Such questions permit only one answer if the integrity of the public service and of federal administrative proceedings is to be preserved. The decision below has placed the Court of Appeals, as well as FPC, in the position of "affirmatively sanctioning the type of infected bargain which the statute outlaws and . . . depriving the public of the protection which Congress has conferred". *United States* v. *Mississippi Valley Co., supra*, 364 U.S. at 563.

A need thus has been created for this Court to establish, clearly and beyond doubt, that the services of federal employees are not for sale to litigants in federal proceedings where the Government has substantial and direct interests at stake, and that a litigant who resorts to such tactics is to be rebuffed rather than rewarded. The Court of Appeals decision has completely frustrated the legislative objective. It is a de-

cision which, unless promptly corrected, can be expected to have far-reaching and unwholesome consequences at a time when both the Executive Branch and the Congress are striving to achieve higher standards of integrity in the conduct of the Government's affairs.

CONCLUSION

For each and all of the foregoing reasons certiorari should be granted.

Respectfully submitted,

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November 24, 1962

APPENDIX A

Court of Appeals Order, August 29, 1962

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,653

PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY, WASHINGTON, *Petitioner*,

v.

FEDERAL POWER COMMISSION, *Respondent*,

CITY OF SEATTLE, *Intervenor*.

Before: WILBUR K. MILLER, *Chief Judge*, and BAZELON and BASTIAN, *Circuit Judges*, in Chambers.

ORDER

On consideration of petitioner's motion for leave to submit after argument, a pertinent Washington Supreme Court decision, and to defer decision until final disposition of the state court case in light of the Washington Supreme Court opinion, or in the alternative, to remand the case to the Commission for reconsideration in the light of said opinion, of respondent's and intervenor's answers thereto, and of petitioner's reply, it is

ORDERED by the Court that petitioner be granted leave to file the opinion of the Supreme Court of the State of Washington in the case of *Beezer* v. *The City of Seattle, et al.* No. 36486, decided July 12, 1962, and the Clerk is directed to file the lodged copies thereof in this case, and it is

FURTHER ORDERED by the Court that petitioner's motion to defer decision or in the alternative to remand be, and it is hereby, denied.

PER CURIAM.

Dated: Aug. 29, 1962

APPENDIX B

Court of Appeals Opinion, August 30, 1962

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,653

PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY, WASHINGTON, *Petitioner*

v.

FEDERAL POWER COMMISSION, *Respondent*
CITY OF SEATTLE, *Intervenor*

Petition for Review of Order of the Federal Power Commission

Decided August 30, 1962

Messrs. Clarence C. Dill and *Joseph Volpe, Jr.*, with whom *Mr. Bennett Boskey* was on the brief, for petitioner.

Miss Josephine H. Klein, Attorney, Federal Power Commission, with whom *Messrs. Ralph S. Spritzer*, General Counsel, Federal Power Commission, at the time the brief was filed, *Howard E. Wahrenbrock*, Solicitor, *Leonard D. Eesley*, Assistant General Counsel, and *Joseph B. Hobbs*, Attorney, were on the brief, for respondent. *Mr. Arthur H. Fribourg*, Attorney, Federal Power Commission, also entered an appearance for respondent.

Mr. Richard S. White, of the bar of the Supreme Court of Washington, *pro hac vice*, by special leave of court, with whom *Messrs. Robert L. McCarty* and *Charles F. Wheatley, Jr.*, were on the brief, for intervenor.

Before: WILBUR K. MILLER, *Chief Judge,* and BAZELON and BASTIAN, *Circuit Judges.*

WILBUR K. MILLER, *Chief Judge:* On July 29, 1957, the City of Seattle applied to the Federal Power Commission for a license[1] to construct and operate a hydroelectric project at what is called the "Boundary" site on the Pend Oreille River. Public Utility District No. 1 of Pend Oreille County, a municipal power corporation of the State of Washington, on August 27, 1957, petitioned to intervene, and later filed an application for a license for a similar project at its Z Canyon site, about one mile south of Seattle's "Boundary" location. At a hearing conducted by the Commission on these mutually exclusive applications, PUD argued that certain employees of the U. S. Bureau of Reclamation, who prepared the technical portions of Seattle's original application[2] and accepted compensation therefor, thereby violated 18 U. S. C. § 281,[3] often called a conflict of interest statute, and that the City

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[1] Under Section 4(e) of the Federal Power Act, 16 U.S.C. § 797(e), 49 STAT. 839.

[2] One of them testified at the hearing before the examiner.

[3] Section 281 is, in pertinent part, as follows:

> "Whoever, being a Member of or Delegate to Congress, or a Resident Commissioner, either before or after he has qualified, or the head of a department, or other officer or employee of the United States or any department or agency thereof, directly or indirectly receives or agrees to receive, any compensation for any services rendered or to be rendered, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter in which the United States is a party or directly or indirectly interested, before any department, agency, court martial, officer, or any civil, military, or naval commission, shall be fined not more than $10,000 or imprisoned not more than two years, or both; and shall be incapable of holding any office of honor, trust, or profit under the United States."

of Seattle was equally guilty under 18 U. S. C. § 2.[4] PUD insisted that, because of these alleged criminal acts, the material prepared by the government employees should be rejected, and Seattle should be disqualified as an applicant.

The examiner gave careful consideration to PUD's contention concerning § 281 and found the record presented "no conceivable conflict of interest," and on rehearing the Commission said on that subject:

> ". . . On the record before us, we can find no conflict of interest which as a matter of policy would impel us to exclude the testimony and exhibits in question. And apart from such a conflict of interest as might require their exclusion as a matter of policy, we know of no basis in law or equity for excluding said testimony and exhibits. We cannot conclude, as PUD would have us do, that the appearance of Mr. Winter [the Board of Reclamation witness] and the admission into evidence of exhibits prepared by him and others constitute an assault upon the 'integrity of the administrative process' which requires dismissal of Seattle's application."

So, the Commission sustained the examiner's ruling on the conflict of interest question; and in accordance with his recommendation also rejected the other arguments of PUD and awarded a license to Seattle. PUD petitions for review.

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[4] Section 2 is as follows:

> "(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> "(b) Whoever, willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

Vigorously pressing upon us its contention that the Commission erred in not dismissing Seattle's application because of the alleged violations of § 281, PUD relies, *inter alia*, on the Dixon-Yates case[5] and *May* v. *United States*, 84 U.S. App. D. C. 233, 175 F. (2d) 994, *cert. denied* 338 U.S. 830 (1949).

The Supreme Court held in the Dixon-Yates case that the primary purpose of the statute there involved[6] "is to protect the public from the corrupting influences that might be brought to bear upon government agents who are financially interested in the business transactions which they are conducting on behalf of the Government." The Court said a criminal prosecution is not the Government's sole remedy in a case such as Dixon-Yates, and that the public interest can be fully protected "only if contracts which are tainted by a conflict of interest on the part of a government agent *may* be disaffirmed by the Government." (Emphasis added.) 364 U.S. at 563.

But the Dixon-Yates case does not hold, nor does any other authority to our knowledge, that a transaction is automatically void because there may have been involved in it a technical violation of the conflict of interest statutes. Neither the Government nor any of its agencies has attacked the grant of a license to Seattle as being contrary to the public interest because of the alleged violations of § 281, and no criminal action has been instituted against the parties accused by PUD.

The case of *May* v. *United States*, cited by the petitioner, holds, 84 U. S. App. D. C. at 245:

> ". . . [I]f a Congressman receives compensation for services rendered by him to a person in relation to any

[5] United States v. Mississippi Valley Generating Co., 364 U.S. 520 (1961).

[6] 18 U. S. C. § 434.

> matter in which the United States is interested, before any Government department, he is guilty of violating the statute [18 U. S. C. § 216], even though the service rendered was a proper act on his part. . . ."

But the Government department before which May appeared was not required to repudiate or disregard things properly said or done by him in his appearances merely because he may have violated the law by receiving compensation for appearing. For this reason we think the *May* case is not helpful to petitioner here.

We find nothing in the record to indicate that there was here the "influence peddling" at which § 281 was aimed. No corrupt or venal motive is shown on the part of Seattle or the Bureau of Reclamation engineers, and it does not appear that the Commission gave any more weight to the material furnished by the government employees than if it had been prepared by others. Moreover, § 281, a criminal statute, prescribes no civil or administrative sanctions. Even if it has been technically violated here, it does not follow that the grant of a license to Seattle should be set aside for that reason alone.

In another argument against the Commission's grant of a license to the City, PUD suggests that Seattle is not qualified to be a licensee, as it cannot acquire by purchase land indispensably necessary to its project because PUD owns the land and is unwilling to sell it. It further suggests that Seattle is unable to acquire the land by condemnation because the Washington statute which confers the powers of eminent domain on a city which owns its own electric power and light plant forbids its exercise with respect to "the electric power and light plant or electric system, or any part thereof, belonging to or owned or

operated . . . by a public utility district.'"[7] For these reasons, PUD contends that Seattle did not and cannot submit to the Commission

> "[s]atisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks . . ."

as required by Section 9(b) of the Federal Power Act.[8] It is said that, therefore, Seattle's application should have been denied.

The Supreme Court has held that Section 9(b) does not in itself require compliance with state law; it only empowers the Commission to require such evidence of compliance with state law as, in the Commission's judgment, would be "appropriate to effect the purposes of a federal license on the navigable waters of the United States." *First Iowa Hydro-Elec. Coop.* v. *Federal Power Comm'n*, 328 U. S. 152, 167 (1946). Strictly speaking, the question is not whether Seattle has complied or can comply with the state eminent domain statute, but rather whether the limiting provision of that statute prevents Seattle from exercising the right of condemnation conferred on it by

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[7] Revised Code of Washington (1951), § 35.84.030:

"§ 35.84.030. LIMITATION ON RIGHT OF EMINENT DOMAIN. Every city or town owning its own electric power and light plant may exercise the power of eminent domain as provided by law for the condemnation of private property for any of the corporate uses or purposes of the city or town: *Provided*, That no city or town shall . . . acquire by condemnation the electric power and light plant or electric system, or any part thereof, belonging to or owned or operated . . . by a public utility district."

[8] 16 U. S. C. § 802(b), 41 STAT. 1068.

Section 21 of the Federal Power Act.[9] That is to say, once Seattle has become a federal licensee, does the prohibitory provision of the state condemnation statute disable it from going forward with its federally-licensed project by preventing it from condemning under Section 21 of the Federal Power Act the land necessary for its purposes?

A similar problem was presented to the Ninth Circuit in *State of Washington Dept. of Game* v. *Federal Power Comm'n.*[10] There a license issued by the Power Commission to the City of Tacoma was attacked because the City had not obtained the approval of certain State officials as required by statutes of Washington and because the proposed dams would exceed the height limits the Washington legislature had put upon dams in the streams involved. The objectors contended that Tacoma, a creature of the State of Washington, could not act in opposition to the policy of the State or in derogation of its laws.

Relying on the *First Iowa* case, *supra*, the Court of Appeals for the Ninth Circuit held that "the state laws cannot prevent the Federal Power Commission from issuing a license or bar the licensee from acting under the license

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[9] 16 U. S. C. § 814, 41 STAT. 1074:

"Sec. 21. That when any licensee can not acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the State courts. . . ."

[10] 207 F. (2d) 391 (1953), *cert. denied* 347 U. S. 936 (1954).

to build a dam on a navigable stream since the stream is under the dominion of the United States." 207 F. (2d) at 396. After this unequivocal holding, the Ninth Circuit went on to say:

> ". . . However, we do not touch the question as to the legal capacity of the City of Tacoma to initiate and act under the license once it is granted. There may be limitations in the City Charter, for instance, as to indebtedness limitations. Questions of this nature may be inquired into by the Commission as relevant to the practicability of the plan, but the Commission has no power to adjudicate them."

PUD relies on this language in arguing the court did not hold that Tacoma might act under the federal license in a manner prohibited by state law.

In *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U. S. 320 (1958), the Supreme Court, in considering the same argument which PUD advances here, had occasion to construe the Ninth Circuit opinion. It said, at pages 339-40:

> "But the respondents say that the Court of Appeals did not decide the question of legal capacity of the City to act under the license and, therefore, its decision is not final on that question, but left it open to further litigation. They rely upon the following language of the opinion:
>
> "'[. . .] However, we do not touch the question as to the legal capacity of the City of Tacoma to initiate and act under the license once it is granted. There may be limitations in the City Charter, for instance, as to indebtedness limitations. Questions of this nature may be inquired into by the Commission as relevant to the practicability of the plan, but the Commission has no power to adjudicate them.' [207 F. (2d) at 396.]

> We believe that respondents' construction of this language is in error. The questioned language expressly refers to possible 'indebtedness limitations' in the City's Charter and 'questions of this nature,' *not to the right of the City to receive and perform, as licensee of the Federal Government under the Federal Power Act, the federal rights determined by the Commission and delegated to the City as specified in the license.* . . ." (Emphasis added.)

What precedes makes it clear that the State statute here involved, even if according to its own terms it is applicable, cannot make it impossible for Seattle as a federal licensee to condemn under the federal statute. Were it otherwise—*i.e.*, if indeed the limitation of the state-granted right of eminent domain prevented the exercise of federally-granted power of condemnation in the area proscribed by it—PUD's argument that it disables Seattle in this situation could not be upheld. For, it does not appear that the land owned by PUD and needed by Seattle is a part of the former's electric plant or system which the Washington statute protects from condemnation by a city or town. The record does not show that the property here involved is used by PUD in its operations, or that in the future it will be useful to PUD in any way except in connection with its Z Canyon project which has been foreclosed by the grant of the license to Seattle. So, after the City's license is finally affirmed and it begins condemnation, the site now owned by PUD will not be in any sense a part of its electric plant or system and the State statute, even if in this situation it were effective according to its terms, would not prevent Seattle from condemning the needed land.

PUD attacks the Commission's action on several other grounds. Among them is the contention that the Commission deprived it of "a fair hearing on the economic and engineering feasibility of the conflicting projects by

reserving for subsequent *ex parte* adjudication substantial issues relating to mine damage." The argument is based on the fact that Seattle did not propose, and the Commission did not require, elaborate and expensive precautions against damage to extensive lead and zinc mines in the area which PUD says may result from the construction of Seattle's dam.

Mining interests intervened before the Commission, contending that neither project should be licensed because either would threaten substantial permanent damage to their properties. Many expert witnesses testified on the mine damage issue, which was heard separately. The examiner concluded the possibility of damage was too slight and remote to require the refusal of a license. The Commission agreed. It said it did not anticipate serious damage to the mines from the Boundary reservoir but did require that certain steps be taken to guard against it. In addition, the Commission inserted the following in Seattle's license:

> "Article 43. The licensee shall take appropriate measures to assure the watertightness of the reservoir, and the Commission reserves the right to require the licensee to take such measures both prior to and after the initial filling of the reservoir."

This is the so-called reservation of the mine damage issue "for subsequent *ex parte* adjudication" which PUD says deprived it of a fair hearing on the economic and engineering feasibility of the projects.

We consider Article 43 as no more than a requirement that, in addition to the specific precautionary measures prescribed elsewhere in the license, the licensee meet any unforeseen condition which may develop, and an assurance that the Commission will exercise continuous supervision over the project. The record justified the action of the Commission in this regard and did not demonstrate the

necessity for making any further requirements of the licensee. We regard it as significant that the mining interests have not petitioned for review and have not sought to intervene in this proceeding.

The remaining points urged by PUD do not seem to us to require discussion. They relate to matters about which the Commission had discretion which it did not abuse.

Affirmed.

APPENDIX C

Supreme Court of Washington Opinion, July 12, 1962

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 36,486
En Banc

ROBERT R. BEEZER, *Appellant*,

v.

THE CITY OF SEATTLE, GORDON S. CLINTON, as Mayor of said City, and M. B. MITCHELL, DAVID LEVINE, CHARLES M. CARROLL, CLARENCE F. MASSART, J. D. BRAMAN, MYRTLE S. EDWARDS, FLOYD C. MILLER, BOB JONES and PAUL J. ALEXANDER, as the duly constituted Council of the City of Seattle, *Respondents*,

PUBLIC UTILITY DISTRICT NO. 1 of PEND OREILLE COUNTY, WASHINGTON, *Intervenor-Appellant*.

Filed July 12, 1962.

The issue presented is another and, as yet, unexplored facet of the obligation of a municipal corporation, existing under and by virtue of the laws of the state of Washington, to comply with the laws of that state.

The city of Seattle has applied for and received a license from the Federal Power Commission for the development of a hydroelectric project on the Pend Oreille River (referred to herein as the Boundary project), and involving the construction of a dam on a site presently owned by Public Utility District No. 1 of Pend Oreille County. (It is conceded that the city intends to condemn this and other property of the P.U.D.)

In 1930, the people of this state adopted, by the initiative, the public-utility-district law,

> ". . . to conserve the water and power resources of the State of Washington for the benefit of the people

> thereof, and to supply public utility service, including water and electricity for all uses." Laws of 1931, chapter 1, § 1, p. 3.

As adopted, it contained, and still does, a provision forbidding a district created thereunder from condemning any public utility owned by a city or town (RCW 54.16.020).

In 1933, the legislature made the prohibition work both ways by forbidding any city or town from acquiring by condemnation,

> "... the electric power and light plant or electric system, or any part thereof, belonging to or owned or operated .... by a public utility district." RCW 35.84.030.[1]

This is a declaratory judgment action predicated on the proposition that the city of Seattle, faced with this express prohibition, cannot acquire by condemnation the property of Public Utility District No. 1 of Pend Oreille County; and, consequently, should be enjoined from the expenditure of money in the furtherance of a project which it cannot complete.

The trial court entered a summary judgment dismissing the action, apparently believing that the issue had been

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[1] "Every city or town owning its own electric power and light plant may exercise the power of eminent domain as provided by law for the condemnation of private property for any of the corporate uses or purposes of the city or town: *Provided*, That no city or town shall acquire, by purchase or condemnation, any publicly or privately owned electric power and light plant or electric system located in any other city or town except with the approval of a majority of the qualified electors of the city or town in which the property to be acquired is situated; nor shall any city or town acquire by condemnation the electric power and light plant or electric system, or any part thereof, belonging to or owned or operated by any municipal corporation, mutual, nonprofit, or cooperative association or organization, or by a public utility district." RCW 35.84.030

determined in the prior litigation involving the right of the city of Tacoma to build dams on the Cowlitz River.[2]

We do not regard anything actually decided in the Cowlitz litigation as decisive of the present case. In the first place, it was conceded that when the city of Tacoma received its license to proceed with the Cowlitz project and construct the necessary dams, there was nothing limiting its authority so to do. Here, the city of Seattle, at the time it applied for its license to proceed with the Boundary project, had a known and express limitation on its power, *i.e.*, it could not condemn

> ". . . the electric power and light plant or electric system, or any part thereof, belonging to or owned or operated . . . by a public utility district."

This was not necessarily a disqualification as a licensee, because it was entirely possible, and for a time appeared probable, that the city would acquire by mutual agreement with the P.U.D. the property it required.

In the second place, it has been, and is, our view that the Supreme Court of the United States in *City of Tacoma* v. *Taxpayers* (1958), 357 U. S. 320, 2 L. Ed. (2d) 1345, 78 S. Ct. 1209, did not pass upon the proposition which we deemed decisive in our second Cowlitz case (*City of Tacoma* v. *Taxpayers* (1957), 49 Wn. (2d) 781, 307 P. (2d) 567), *i.e.*, that the Federal government may not confer powers upon local units of government created by the state beyond

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[2] In chronological reverse order the decisions are: *City of Tacoma* v. *Taxpayers* (1962), 160 Wash. Dec. 64, . . . P. (2d) . . . (our third Cowlitz case); *City of Tacoma* v. *Taxpayers* (1958), 357 U. S. 320, 2 L. Ed. (2d) 1345, 78 S. Ct. 1209; *City of Tacoma* v. *Taxpayers* (1957), 49 Wn. (2d) 781, 307 P. (2d) 567 (our second Cowlitz case); *City of Tacoma* v. *Taxpayers* (1953), 43 Wn. (2d) 468, 262 P. (2d) 214 (our first Cowlitz case); *State of Washington Department of Game* v. *Federal Power Commission* (1953), 207 F. (2d) 391 (C.A. 9th).

the capacity given them by their creator. The Supreme Court of the United States reversed our decision in that case on the basis of res judicata, stating that the state of Washington and its citizens were foreclosed by the judgment in the Court of Appeals (*State of Washington Department of Game* v. *Federal Power Commission* (1953), 207 F. (2d) 391 (C.A. 9th)), from litigating further the power and authority of the city of Tacoma to proceed under its Federal Power Commission license to build dams. (In the present case, it is urged that the federal government, through the Federal Power Commission, may confer upon the city of Seattle, through its license, powers which the city was expressly prohibited by state statute from exercising at the time it made its application for a license to proceed with the Boundary project.)

The city of Seattle's power of eminent domain has been at all times, since the effective date of RCW 35.84.030, *i.e.*, 1933, subject to the prohibition set forth in that act (heretofore quoted in note 1). This is clearly a declaration of the public policy of the state, dating back thirty years, and is in no sense an attempt to exercise a veto over said project.

Whether the Federal Power Commission can confer powers of condemnation on cities, which the state legislature has, as a matter of policy, expressly prohibited, the federal courts must determine. If the city of Seattle could accept such a license only subject to an existing express statutory prohibition, which precluded its condemnation of P.U.D. property of the character described in RCW 35.84.030, then it is indisputable that a controversy exists which must be determined in accordance with the law of the state of Washington; and neither the Federal Power Commission nor the federal courts can make a conclusive determination on that point. That controversy is whether the property of the P.U.D., which the city of Seattle concedes it intends to condemn, is within the statutory prohibition, *i.e.*, is an

"electric power and light plant or electric system, or any part thereof." We are here concerned with the interpretation and application of state law, and our courts should not hesitate to proceed with that interpretation and application.

We, therefore, set aside the summary judgment of dismissal, and direct the trial court to proceed with the determination of whether the property of the P.U.D., which the city of Seattle now takes the position it must condemn, is an "electric power and light plant or electric system, or any part thereof." If it is not, the action should be dismissed and the city left free to proceed to exercise its power of condemnation. If it is, we do not presume to suggest to the trial court what its action should be, because, as we have indicated, the city may find that if it has no power of condemnation, it may still be possible to acquire the property by negotiation and proceed under its license; and it should not be precluded from so doing.

HILL, *J.*

WE CONCUR:

WEAVER, *J.*
ROSELLINI, *J.*
OTT, *J.*
FOSTER, *J.*
HUNTER, *J.*

DONWORTH, *J.* (dissenting)—In order to understand the principal issue involved in this case it is necessary to state the history of the dispute rather fully. The principal litigants are the city of Seattle (herein called the city), which desires to construct a dam on the Pend Oreille River, a navigable stream in northeastern Washington, for the development of a hydroelectric project (referred to as the Boundary project) and Public Utility District No. 1 of Pend Oreille County (herein referred to as the P.U.D.), which desires to develop a hydroelectric project on land owned by it on the same river at Z Canyon, which is about

a mile upstream from the location of the city's proposed dam.

A brief chronological statement of proceedings material to our consideration of this case follows:

October, 1953—The city applied to the Federal Power Commission (herein called the F.P.C.) for a preliminary permit for the hydroelectric project above referred to (designated as Project No. 2144). Notice thereof was duly published.

January, 1954—The P.U.D. timely filed with the F.P.C. a petition in intervention in opposition to the issuance of the preliminary permit on several grounds, including the contention that RCW 35.84.030 was an absolute prohibition against the condemnation by the city of the P.U.D.'s property. This petition to intervene was granted February 5, 1954. No other person petitioned to intervene in this proceeding.

August 30, 1954—A three-year preliminary permit was issued to the city.

July 29, 1957—The city filed an application for a license to construct the proposed Boundary dam. Notice thereof was duly published.

August, 1957—The P.U.D. again petitioned the F.P.C. for leave to intervene, raising the contention that, for the reason stated above, RCW 35.84.030 prevented the city from performing under a license, if granted. Permission to intervene was granted October 7, 1957.

September 5, 1958—The P.U.D. filed an application for a license to construct a dam on the Pend Oreille River about a mile upstream from the location of the city's proposed dam. The P.U.D.'s project was designated as Project No. 2250. The city's petition to intervene in this proceeding was granted.

October 20, 1958—The F.P.C. entered an order consolidating both projects for hearing. Since these two projects overlapped to such an extent that a license could not be granted to each applicant, the F.P.C., under § 7(a) of the Federal Power Act, was required to decide which project (if either) complied with the criteria prescribed by the act for the development of the Pend Oreille River.

December 1, 1958—The P.U.D. moved for the dismissal of the city's application for a license regarding Project No. 2144 on the ground that the city was without legal capacity to apply for or receive such license because "the laws of the State of Washington expressly prohibit Seattle from acquiring such properties of the District by condemnation." This motion to dismiss was passed for consideration until after the hearing on the merits.

January 15, 1959 to February 23, 1960—Hearings were held from time to time before an examiner at which testimony and documentary evidence were received as to the merits of the two projects. In the city's brief in this court it is stated that these hearings consumed 126 days and produced a transcript consisting of 17,228 pages, and that some 450 exhibits were introduced in evidence at the hearings.

March 10, 1961—The examiner who presided at the consolidated hearings filed his decision, in which he denied the P.U.D.'s motion to dismiss the city's application for a license (based on RCW 35.84.030) and recommended that a license be issued to the city for Project No. 2144. The examiner's decision included the following statement:

> "It is further concluded that upon the conditions set out in the order issued herewith, the project proposed by the City of Seattle for construction, maintenance and operation at the Boundary site on the Pend Oreille River is best adapted to a comprehensive plan for improving and developing the reach of the

> Pend Oreille River between Project No. 2042 [Box Canyon dam owned and operated by PUD][1] and the United States-Canadian border."

The examiner further stated that the P.U.D. had failed to produce probative and convincing evidence that there was, or in the near future would be, a market for a substantial portion of the electric power which would be produced by Project No. 2250.

The P.U.D. filed objections to the examiner's decision and included its argument that the city could not perform under its license (if issued) because of RCW 35.84.030.

July 10, 1961—After oral argument before the members of the F.P.C., the Commission issued its order granting a license to the city for Project No. 2144 and dismissing the P.U.D.'s application for a license for Project No. 2250. The Commission adopted the examiner's decision (as modified by its order) as the decision of the Commission. Its decision included the following finding:

> "(4) Seattle is a municipality within the meaning of Section 3(7) of the Act, and has submitted satisfactory evidence of compliance with the requirements of all applicable state laws insofar as necessary to effect the purposes of a license for Project No. 2144."

August 8, 1961—The P.U.D. filed with the Commission a petition for a rehearing, again raising the question of the city's inability to condemn its property because of RCW 35.84.030.

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[1] The Box Canyon dam (Project No. 2042) is located on the Pend Oreille River about fifteen miles upstream from the site of the proposed Z Canyon dam (Project No. 2250), for the construction of which the P.U.D. was seeking a license from the F.P.C. and for which its application was dismissed by the Commission's order of July 10, 1961. The Box Canyon dam was involved in *State ex rel. P.U.D. No. 1 v. Schwab,* 40 Wn. (2d) 814, 246 P. (2d) 1081 (1952).

September 6, 1961—This petition for rehearing was denied by further opinion and order of the Commission. Concerning the power of the city to condemn the P.U.D.'s property and the city's compliance with § 9(b) of the Federal Power Act, the Commission said:

> "PUD contends that the Commission erred in adopting the examiner's discussion and disposition of the issue as to whether Seattle has power to acquire by condemnation lands belonging to PUD and necessary for Seattle to effect the purposes of the license issued to it. The examiner denied PUD's motion to dismiss Seattle's application because of its inability to comply with the requirements of Section 9(b) of the Federal Power Act, and concluded that should Seattle receive a license, its power to acquire the properties in question is clear under *City of Tacoma* v. *Taxpayers*, 357 U. S. 320.
>
> "PUD takes the position that Seattle is powerless to acquire PUD's lands by reason of a specific prohibition in Section 35.84.30 [.030] of the Revised Code of Washington (1951); that Seattle cannot qualify as an applicant for a license because of its inability to show compliance with the requirements of state law as required by Section 9(b) of the Federal Power Act; and that the Washington statute's restriction on Seattle's capacity to condemn PUD's properties is an impediment to Seattle's exercise of the right granted to a licensee by Congress in Section 21 of the Federal Power Act to acquire necessary properties by eminent domain in the federal courts. We need not decide in this proceeding whether Seattle is prohibited by state law from acquiring the particular properties of PUD in question. In our opinion Seattle's right to acquire these properties by the exercise of the power of eminent domain under Section 21 of the Federal Power Act is well established. *FPC* v. *Tuscarora Indian Nation*, 362 U. S. 99; *City of Tacoma* v. *Taxpayers*, supra; *First Iowa*

Hydro-Electric Cooperative v. *FPC*, 328 U. S. 152; *State of Washington Department of Game* v. *FPC*, 207 F. (2d) 391, cert. den. 347 U. S. 936. And as we found in our order issuing license, Seattle has submitted satisfactory evidence of compliance with the requirements of all applicable state laws insofar as necessary to effect the purposes of the license."

It should be noted that the Commission did *not* decide whether or not the city was prohibited by RCW 35.84.030 from acquiring the P.U.D.'s properties by condemnation because, even if it were so prohibited, the city could exercise the power of eminent domain under § 21 of the Federal Power Act, which reads as follows:

"When any licensee cannot acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property or others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided*, That United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000." 16 U.S.C. § 814.

September 26, 1961—The P.U.D. filed a petition with the United States Court of Appeals for the District of Columbia to review and set aside the orders of the Federal Power Commission above referred to. In its petition for review, one of the grounds for relief is stated as follows:

> "(6) The Commission erred in concluding that Seattle has complied with Section 9(b) of the Federal Power Act, 16 U.S.C. § 802(b), which requires an applicant to submit satisfactory evidence of compliance with the laws of the state within which the project is located with respect to bed and banks of the river. The Commission erroneously concluded also that it need not decide whether the laws of Washington prohibit condemnation of the PUD's properties, on the basis of the case of *City of Tacoma* v. *Taxpayers*, 357 U. S. 320 and other cases it cited. The cases cited, for numerous reasons, are both non-controlling and inapplicable. Moreover, these cases related to state laws forbidding a dam in a navigable stream instead of a law prohibiting the use of the power of condemnation by municipal corporations, one against the other, which makes no reference to a river. The Commission erroneously concluded that, even though it be assumed Seattle is incapacitated by state law from condemning PUD's properties, nevertheless Seattle has a right to acquire these properties by exercising the power of eminent domain under Section 21 of the Federal Power Act, 16 U.S.C. § 814. The Commission erroneously concluded that *City of Tacoma* v. *Taxpayers*, 357 U.S. 320, and the other cases it cited, established that in the exercise of the eminent domain powers of Section 21 of the Federal Power Act, 16 U.S.C. § 814, Seattle could override the state's laws specifically limiting the intrastate relationship between a city and a public utility district. In these respects the Commission misinterpreted the Federal Power Act and its orders are in conflict with fundamental

principles of law governing the division of authority under our Constitution between the state governments and the Federal Government. In addition, the Commission erred in failing and refusing to consider and to give proper weight, in the application of the Federal Power Act, to the policy expressed by the Washington statute which deprives Seattle of capacity to condemn PUD's properties."

The city's motion for permission to intervene was granted by the court of appeals. This cause (No. 16,653) was argued by both the P.U.D. and the city on May 7, 1962. As yet, no decision has been announced. Thus, the controversy is now resting in the bosom of the only court in the land that has competent jurisdiction to decide it. *City of Tacoma* v. *Taxpayers*, 357 U. S. 320, 2 L. Ed. (2d) 1345, 78 S. Ct. 1209.

It was stated by counsel at the oral argument in this court that the court of appeals had been requested by the P.U.D. to withhold its decision pending the final decision of this court construing RCW 35.84.030 with respect to the power of the city to condemn the P.U.D.'s property. The court of appeals has not indicated whether it will comply with this suggestion.

The case at bar was instituted on November 30, 1961, by a taxpayer and customer of the Seattle lighting department against the city for a declaratory judgment construing RCW 35.84.030. The P.U.D. was permitted to intervene in the trial court and contended that the statute should be construed as forbidding the city to condemn its property. Whether the original plaintiff had standing to maintain a declaratory judgment action under the circumstances described above, it is not necessary to decide.

We have before us the same two adversary litigants (the P.U.D. and the city) who vigorously argued the merits of the question of the city's power (or lack of power) to

condemn the P.U.D.'s property both before the Federal Power Commission and the court of appeals. At that time, there was no decision of this court construing RCW 35.84.030, and, of course, there still is none. The F.P.C. ruled that there was no necessity to consider RCW 35.84.030 at all because the city had authority to condemn the P.U.D. property under § 21 of the Federal Power Act quoted above.

The question before us is whether the trial court erred in holding that it had no jurisdiction to decide the same dispute which had been submitted to, and (for the reason just mentioned) was *not* decided by, the Federal Power Commission (and was then pending before the Court of Appeals). The hearing before the trial court was held on January 8 and 9, 1962.

As appellants contend, there is no doubt that, as a general proposition, a municipality is a creature which owes its existence and its power to function to state statutes and that it has only the powers vested in it by the legislature.

Neither is there any doubt concerning appellants' further contention that the interpretation of a statute by the highest court of the state with respect to a particular state of facts is binding on all Federal courts.

The determinative question is whether the Federal Power Commission has jurisdiction to issue a license when, in compliance with § 9(b) of the Federal Power Act, it has made a finding that the applicant has complied with the requirements of the laws of the state with respect to the right to engage in the business of developing, transmitting, and distributing, and any other business necessary to effect the purposes of the license.

Having made such finding, the F.P.C. has power to proceed as it did under the act, unless the court of appeals upon review decides otherwise.

As I view the problem, it was so held by the Supreme Court of the United States in 1946, when it decided the

case of *First Iowa Hydro-Electric Coop.* v. *Federal Power Commission*, 328 U. S. 152, 90 L. Ed. 1143, 66 S. Ct. 906.

Even if the F.P.C. had passed on the applicability of RCW 35.84.030, the majority of the Supreme Court in the *First Iowa* case, *supra*, held that, under § 9(b) of the Federal Power Act, the Commission had jurisdiction to make a finding that the applicant had complied with all applicable state laws, even in the absence of state court decisions interpreting state statutes.

This is pointed up by the dissenting opinion of Mr. Justice Frankfurter, who differed with the majority on this one point. He said:

> "We are all agreed that Congress had the constitutional power to promote a comprehensive development of the nation's water resources and that it has exercised its authority by the Federal Power Act. 41 Stat. 1063, 49 Stat. 838; 16 U.S.C. §§ 791(a) *et seq.* See *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53; *New Jersey* v. *Sargent*, 269 U. S. 328; *United States* v. *Appalachian Power Co.*, 311 U. S. 377. And in view of Congress' power, of course this enactment overrides all State legislation in conflict with it. But the national policy for water power development formulated by the Federal Power Act explicitly recognizes regard for certain interests of the States as part of that national policy. This does not imply that general, uncritical notions about so-called 'States' rights' are to be read into what Congress has written. It does mean that we must adhere to the express Congressional mandate that the public interest which underlies the Federal Power Act involves the protection of particular matters of intimate concern to the people of the States in which proposed projects requiring the sanction of the Federal Power Commission are to be located. By § 9 (b) of the Act, 41 Stat. 1063, 1068; 16 U.S.C. § 802 (b), Congress explicitly required that before the Commis-

sion can issue a license for the construction of a hydroelectric development, such as the proposed project of the petitioner, the Commission must have 'satisfactory evidence that the applicant has complied with the requirements of the laws of the State' in reference to the matters enumerated.

"Whether the Commission has such 'satisfactory evidence' necessarily depends upon what the requirements of State law are. In turn, what the requirements of State law are often depends upon the appropriate but unsettled construction of State law. And so, the Commission may well be confronted, as it was in this case, with the necessity of determining what the State law requires before it can determine whether the applicant has satisfied it, and, therefore, whether the condition for exercising the Commission's power has been fulfilled.

"To safeguard the interests of the States thus protected by § 9 (b), Congress has directed that notice be given to the State when an application has been filed for a license, the granting of which may especially affect a State. § 4 (f), 49 Stat. 838, 841; 16 U.S.C. § 797 (f). If a State does not challenge the claim of an applicant, the evidence submitted by the applicant, if found to be satisfactory by the Commission, has met the demands of § 9 (b), and a State cannot thereafter challenge the Commission's determination. But a real problem in administration is presented to the Power Commission when a State does intervene and claims that the applicant has not complied with its lawful requirements. For, before the Commission can meet the duty placed on it by § 9 (b), it must ascertain the scope and meaning of the State law. Suppose the State law is not clear or is susceptible of different constructions and has received no construction by the only authoritative source for the inter-

pretation of State laws, namely, the highest court of the State. Must the Federal Power Commission give an independent interpretation of the laws of the State? This is not to suggest an unreal or hypothetical situation. The Federal Power Commission submitted here a compilation of laws relating to State requirements relevant under § 9 (b) for not less than thirty States. Are the lawyers of the Commission to make themselves the originating interpreters of the laws of these States? Are they to construe, for instance, the laws of New Jersey and Oklahoma and Arizona and Illinois when the courts of those States have not spoken? And if they do and the State appeals from the decision, must the Court of Appeals for the District of Columbia become the interpreter of these various laws? Finally, in the event of a further appellate review is this Court to construe State legislation without guidance by the State courts? Time out of mind, and in a variety of situations, this Court has admonished against the avoidable assumption by this Court of the independent construction of State legislation. See, *e.g.*, *Gilchrist* v. *Interborough Co.*, 279 U. S. 159, 207-209; Brandeis, J., dissenting, in *Railroad Comm'n* v. *Los Angeles R. Co.*, 280 U. S. 145, 158, 164-66. It is pertinent to recall the classic statement of the reason for leaving to the controlling interpretation of local courts the meaning of local law: 'to one brought up within it, varying emphasis, tacit assumptions, unwritten practices, a thousand influences gained only from life, may give to the different parts wholly new values that logic and grammar never could have got from the books.' *Diaz* v. *Gonzalez*, 261 U. S. 102, 106. If it has been deemed unwise to throw upon this Court the burden of construing local legislation when the construction could by appropriate procedure be had from the States, it seems odd that we should reject this as a rule of administration adopted by the Power Commission."

It is to be noted that the majority of the Supreme Court did not think that § 9(b) required the Commission to wait until the state courts interpreted the meaning of state laws bearing on the question of the applicant's compliance therewith.

The majority opinion in the present case attempts to distinguish the three *Tacoma* cases cited in footnote 2 on the ground that the decision of the United States Supreme Court (357 U. S. 320, 2 L. Ed. (2d) 1345, 78 S. Ct. 1209) was based solely on the doctrine of *res judicata* regarding the decision of the court of appeals (207 F. (2d) 391). Generally speaking, that is true. But the Supreme Court actually went further and held that the Federal Power Commission's finding (No. 53), to the effect that the applicant (city of Tacoma) had submitted satisfactory evidence of compliance with all state laws insofar as necessary to effectuate the purposes of the project, was, after being approved by the court of appeals (and *certiorari* denied by the Supreme Court), binding on the parties involved. See 357 U. S., pp. 334-337.

In this case, the Federal Power Commission decided that it was not necessary to pass on the meaning or validity of RCW 35.84.030 because the city had power, under § 21 of the Federal Power Act (above quoted), to condemn the necessary properties of the P.U.D. The jurisdiction of the court of appeals has been invoked to review that decision. As pointed out by the United States Supreme Court in the *Tacoma* case, *supra*, the court of appeals has *exclusive* jurisdiction to affirm, set aside, or modify, in whole or in part, orders of the Federal Power Commission. That court now has under consideration the question of the correctness and validity of the finding above quoted.

Until that court renders its decision or stays its hand pending the final decision of this court (if it so elects), no other court in the land, state or Federal, has jurisdiction of the issue presented to the trial court in this case."

In the interest of brevity, reference is made to the concurring opinion in the most recent *Tacoma* case (160 Wash. Dec. 64) at page 71 *et seq.*, and the authorities cited therein. It is recognized that in that case Initiative No. 25 was not enacted until many years after the Federal Power Commission had issued, and the city of Tacoma had accepted, a license for the project, while in this case the statute claimed to be prohibitory had been on the books for over twenty-five years prior thereto. However, the question of jurisdiction is settled by the *First Iowa* case and the *Tacoma* case referred to above.

Because the F.P.C. did not find it necessary to decide the question urged upon us by appellants and for the further reason that the court of appeals has exclusive jurisdiction of the controversy, it is my opinion that the trial court correctly held that it had no jurisdiction of the controversy, and its judgment dismissing the action should be affirmed.

DONWORTH, *J.*

I concur. HAMILTON, *J.*

The logic or reasoning of the dissent written by Judge Donworth is *in my opinion* unanswerable and it follows that remanding this matter for further proceedings in the trial court is a fruitless act; consequently I concur in the dissent.

FINLEY, *C.J.*

APPENDIX D

Supreme Court of Washington Opinion, October 2, 1962

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 36,486
En Banc

ROBERT R. BEEZER, *Appellant*,

v.

THE CITY OF SEATTLE, GORDON S. CLINTON, as Mayor of said City, and M. B. MITCHELL, DAVID LEVINE, CHARLES M. CARROLL, CLARENCE F. MASSART, J. D. BRAMAN, MYRTLE S. EDWARDS, FLOYD C. MILLER, BOB JONES and PAUL J. ALEXANDER, as the duly constituted Council of the City of Seattle, *Respondents*,

PUBLIC UTILITY DISTRICT No. 1 of PEND OREILLE COUNTY, WASHINGTON, *Intervenor-Appellant*.

Filed Oct. 2, 1962.

PER CURIAM.—This matter comes before us on a motion to dismiss the appeal in this case.

The appeal was argued before this court Thursday, June 14, 1962, and appears in our Advance Sheets of August 3, 1962 (Vol. 160 Wash. Dec. 241, 373 P. (2d) 796).

The city of Seattle filed a timely petition for rehearing, which stayed the going down of the remittitur until we disposed of the petition. While the petition was under consideration, the city of Seattle moved to dismiss the appeal on the basis of the opinion of the United States Court of Appeals for the District of Columbia Circuit, in case No. 16,653, *Public Utility District No. 1 of Pend Oreille, Washington, Petitioner*, v. *Federal Power Commission, Respondent, the City of Seattle, Intervenor*, filed August 30, 1962, affirming an order of the Commission.

It is the contention of the city that this decision of the circuit court is res judicata of the issues raised on this appeal and renders the appeal moot.

We are advised that Public Utility District No. 1 of Pend Oreille County will petition the Supreme Court of the United States to review, by certiorari, the circuit court's affirmance of the order of the Federal Power Commission; and, pending such review, we do not accept the conclusions of the circuit court as res judicata of the issues heretofore determined by this court in its opinion of August 3, 1962. Nor do the conclusions of the circuit court render moot the issues presented to us for determination, unless, and until, the judgment of the circuit court becomes final and binding on Public Utility District No. 1 of Pend Oreille County, Washington.

The motion to dismiss the appeal is denied.

DONWORTH, J. (dissenting)—The decision of the United States Court of Appeals for the District of Columbia, *Public Utility District No. 1 of Pend Oreille, Washington, Petitioner*, v. *Federal Power Commission, Respondent, The City of Seattle, Intervenor*, filed August 30, 1962, F. (2d) , held that there was no need to decide the only question involved in the present case because the City of Seattle had authority under § 21 of the Federal Power Act to condemn the property of the public utility district.

The result of the above majority opinion is to remand the present case to the trial court for the trial of an issue of fact which is now immaterial. It could become material only if the United States Supreme Court should (a) grant the public utility district's proposed petition for certiorari and (b) subsequently reverse the decision of the Court of Appeals. None of the parties are seeking a stay of proceedings in this case until the United States Supreme Court disposes of that case.

For the reasons stated in the dissenting opinions in the instant case (*Beezer* v. *Seattle*, 160 Wash. Dec. 241, 373 P. (2d) 796), the remand of this case at this time is a useless act and will impose on the litigants unnecessary labor and expense.

Assuming that the pending petition for rehearing in this court will be denied, I would grant the city's motion to dismiss the appeal.

DONWORTH, *J.*

We concur in this dissent:

FINLEY, *C. J.*
HAMILTON, *J.*

APPENDIX E

Statutes Involved

18 U.S.C. § 281

§ 281. Compensation to Members of Congress, officers, and others in matters affecting the Government

Whoever, being a Member of or Delegate to Congress, or a Resident Commissioner, either before or after he has qualified, or the head of a department, or other officer or employee of the United States or any department or agency thereof, directly or indirectly receives or agrees to receive, any compensation for any services rendered or to be rendered, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter in which the United States is a party or directly or indirectly interested, before any department, agency, court martial, officer, or any civil, military, or naval commission, shall be fined not more than $10,000 or imprisoned not more than two years, or both; and shall be incapable of holding any office of honor, trust, or profit under the United States. . . . As amended May 24, 1949, c. 139, § 6, 63 Stat. 90.

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18 U.S.C. § 2

§ 2 Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal. As amended Oct. 31, 1951, c. 655, § 17b, 65 Stat. 717.

16 U.S.C. § 802(b) [being Section 9(b) of the Federal Power Act]

§ 802. Information to accompany application for license

Each applicant for a license under this chapter shall submit to the commission—

. . . . . .

(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this chapter. June 10, 1920, c. 285, § 9, 41 Stat. 1068.

---

16 U.S.C. § 814 [being Section 21 of the Federal Power Act]

§ 814. Exercise by licensee of power of eminent domain.

When any licensee cannot acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts

of the state where the property is situated: *Provided*, That United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000. June 10, 1920, c. 285, § 21, 41 Stat. 1074.

Revised Code of Washington (1951), § 35.84.030 (Washington Laws of 1933, Chapter 51, § 3)

§ 35.84.030 LIMITATION ON RIGHT OF EMINENT DOMAIN. Every city or town owning its own electric power and light plant may exercise the power of eminent domain as provided by law for the condemnation of private property for any of the corporate uses or purposes of the city or town: *Provided*, That no city or town shall acquire, by purchase or condemnation, any publicly or privately owned electric power and light plant or electric system, located in any other city or town except with the approval of a majority of the qualified electors of the city or town in which the property to be acquired is situated; nor shall any city or town acquire by condemnation the electric power and light plant or electric system, or any part thereof, belonging to or owned or operated by any municipal corporation, mutual, nonprofit, or cooperative association or organization, or by a public utility district.

SUPREME COURT, U. S.

No. 611

Office-Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY, WASHINGTON, *Petitioner*,

v.

FEDERAL POWER COMMISSION; and CITY OF SEATTLE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE CITY OF SEATTLE IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 611

PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY, WASHINGTON, *Petitioner*

v.

FEDERAL POWER COMMISSION, and CITY OF SEATTLE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE CITY OF SEATTLE IN OPPOSITION

QUESTIONS PRESENTED

The questions posed by petitioner (Pet. 3-5), herein called PUD, present no challenge to the basic finding by the Federal Power Commission that immediate construction by Seattle of Boundary project is necessary to the public interest. PUD's contentions relevant to this basic finding were rejected by the Commission after full hearing. PUD's contentions as to the three questions it seeks to have reviewed here were also rejected unanimously by both the Commission and by the Court of Appeals. As to the first two of these questions, the decisions below were based on principles well settled by this Court; as to the third, the "conflict of interest" issue, PUD's claims rest upon factual assumptions which the FPC and the Court of Appeals refused to accept. In our view, these three ques-

tions, the first two of which present alternative approaches to the same issue, should be restated as follows:

1. Whether the Court of Appeals erred in holding that Seattle, licensed by FPC to construct a major hydroelectric project on a navigable stream, can acquire by condemnation under Section 21 of the Federal Power Act unimproved, unused lands of the PUD, necessary for construction of Seattle's project, but useful to the PUD only in connection with a project which conflicts with Seattle's and which project FPC has refused to license, irrespective of a Washington statute (RCW § 35.84.030) alleged to prevent a city from condemning an "electric power and light plant or electric system" owned by a PUD.

2. Whether, alternatively to its holding under question 1 above, the Court of Appeals erred in deciding that the PUD lands in question were not part of its electric system, rather than deferring decision to await the outcome of an action in the Washington court in which the PUD seeks to litigate the same question.

3. Whether the Court of Appeals erred in refusing to set aside an FPC license on the ground that one of several feasibility designs presented by the licensee in support of its application was prepared by a consulting firm which hired design engineers to work on technical features of the plan in their off-duty hours from regular Bureau of Reclamation employment.

COUNTERSTATEMENT OF THE CASE

The Federal Power Commission granted a license under the Federal Power Act (16 U.S.C. §§ 791a-825r) in 1961 to the City of Seattle to construct a 97 million dollar hydroelectric project on the Pend Oreille River, a major tributary of the Columbia River system and a navigable water of the United States, at a site known as Boundary, located in northeastern Washington. This action culminated an extended proceeding before FPC, beginning with the filing

by Seattle in 1953 of an application for a preliminary permit. Seattle, which owns and operates the second largest municipal electric utility in the United States, has provided for its needs through constructing its own generating resources since 1905, when its first hydro plant went on the line. It applied for Boundary to keep pace with growing demands upon it for electric service. FPC granted a three-year permit in 1954, over the opposition of the Pend Oreille County PUD, petitioner here (13 F.P.C. 1353).

Studies conducted during the first two years of the permit period by engineers on Seattle's own staff showed that a Boundary dam with a reservoir extending 17 miles upstream to the tailwater of the PUD's Box Canyon project, then under construction as FPC Project No. 2042, would provide for a power plant with an ultimate installed capacity of 810,000 kilowatts. Seattle then retained J. L. Savage and Associates of Denver as consultants to prepare feasibility designs for the project from the preliminary plans and other information already developed.

In July of 1957 Seattle filed its license application with FPC for a high dam at Boundary. The PUD intervened and, about a year later, filed an application for a low dam at Z Canyon, one mile upstream from the Boundary site. These conflicting applications were then consolidated for a hearing which consumed 126 days from January 1959 to February 1960, producing a transcript exceeding 17,200 pages. The Presiding Examiner and the Commission found, under Section 10(a) of the Act (16 U.S.C. § 803(a)), that Seattle's Boundary project is best adapted to a comprehensive plan for improving and developing the waterway for the use or benefit of interstate or foreign commerce, and for the improvement and utilization of water power development. Conversely, the PUD's application was rejected on the grounds that any dam at Z Canyon was not comprehensive development of the waterway, that the PUD lacked ability to finance even a low dam and that the PUD had no need for the power. The Court of Appeals upheld the Commission in all respects.

Of the issues raised before the Examiner, the Commission and the Court of Appeals in the nine years of proceedings below, petitioner would bring two to this Court. One, which embraces two of the three questions stated in the petition, relates to the alleged inability of Seattle to condemn PUD land rights within the proposed reservoir. The second relates to an alleged "conflict of interest" said to arise out of the employment by J. L. Savage and Associates of Bureau of Reclamation personnel who assisted in design work on one of the City's proposals. Both of these matters were considered extensively throughout the hearing, in the ensuing briefs, by the Examiner in his decision, by the Commission in two separate orders and by the Court of Appeals. On both matters all of these decisional levels held without dissent against the PUD. When the full facts are considered, any doubt as to the soundness of these unanimous conclusions disappears.

Alleged inability of Seattle to condemn PUD lands

The land rights in question are neither necessary nor useful to the PUD's upstream Box Canyon project. They happened to be included as part of a package of interests acquired in connection with Box Canyon for $20,100. For the most part they consist of shorelands, constituting a narrow, totally unimproved belt between the ordinary high and low water marks of the Pend Oreille River. They also include acreage near the proposed Z Canyon damsite, a portion of which will be inundated by Boundary reservoir. The Examiner and the Commission found the facts against PUD on its contention that the properties were "parts of the PUD's electric power and light plant or electric system." (SJA 229.)[1] The Commission also held that the

[1] The same designations are used as employed by petitioner, i.e., "R." refers to the record as certified to this Court by the Court of Appeals. "JA" and "SJA" refer respectively to the Joint Appendix and Supplemental Joint Appendix, as reproduced for the Court of Appeals. "Tr." refers to the transcript of record certified by FPC to the Court of Appeals.

alleged prohibition in Section 35.84.030 of the Revised Code of Washington (1951) could not bar Seattle, as a federal licensee, from taking the lands necessary for Boundary project because:

> ". . . In our opinion Seattle's right to acquire these properties by the exercise of the power of eminent domain under Section 21 of the Federal Power Act is well established. *FPC* v. *Tuscarora Indian Nation*, 362 U.S. 99; *City of Tacoma* v. *Taxpayers, supra* [357 U.S. 320]; *First Iowa Hydro-Electric Cooperative* v. *FPC*, 328 U.S. 152; *State of Washington Department of Game* v. *FPC*, 207 F. 2d 391, cert. den. 347 U.S. 936. And as we found in our order issuing license, Seattle has submitted satisfactory evidence of compliance with the requirements of all applicable state laws insofar as necessary to effect the purposes of the license." (SJA 316.)

At the same time that it sought review of the Commission's orders by the District of Columbia Circuit, the PUD sought a declaratory judgment against the City through a nominal taxpayer in the state courts of Washington (*Beezer* v. *City of Seattle*, 160 Wash. Dec. 241, 373 P.2d 796, further opinion, 160 Wash. Dec. 652, 375 P. 2d 256). In that case the PUD relied on the same ground that it did before the Circuit Court of Appeals, namely that RCW § 35.84.030 was a bar. The lower Washington state court dismissed the *Beezer* suit on summary judgment on the ground that under *City of Tacoma* v. *Taxpayers*, 357 U.S. 320 (1958) it was an impermissible collateral attack upon the license granted Seattle and the exclusive federal review proceedings thereof specified by Congress in Section 313(b) of the Federal Power Act (16 U.S.C. § 825*l*(b)). On appeal the Washington Supreme Court, in a 6-3 decision entered July 12, 1962, reversed on the narrow ground that the meaning of RCW § 35.84.030 might be relevant if the federal courts in their exclusive review proceedings determined that the Washington law was not superseded by Section 21 of the Federal Power Act. Since

the federal courts had not yet spoken, the court ordered the *Beezer* case remanded for trial on the issue whether the PUD's lands were part of its "electric power and light plant or electric system," within the meaning of the Washington statute.

On August 30, 1962, the Court of Appeals, despite the PUD's having brought the *Beezer* decision to its attention (see Pet. App. A-1), rejected the PUD's appeal in an unanimous opinion by Chief Judge Miller.

Use of Bureau employees by Seattle's design engineers

J. L. Savage and men associated with him in his engineering firm had for some twelve years before the hearings in this case were opened in 1959 been design consultants for Seattle's Department of Lighting (JA 15, 84-85). As Chief Design Engineer for the Bureau of Reclamation before his retirement, Dr. Savage had been in charge of design work involving the City's huge Ross Dam on the Skagit River (FPC Project No. 553) under a contract between Seattle and the Bureau of Reclamation (JA 174-176). When Savage retired from the Bureau, design work on Ross and other Seattle projects such as FPC licensed Gorge and Diablo dams, continued under Savage's direction as consulting engineer. Work for Seattle by the J. L. Savage firm over the years also included a variety of other projects requiring specialized technical knowledge not available on the City's own engineering staff.

In the course of its work for Seattle, the Savage firm had called upon the reservoir of engineering talent in Denver consisting chiefly of retired Reclamation Bureau personnel, as well as enginers currently employed by the Bureau, working however completely outside their hours of federal employment and with full knowledge and official approval of the Bureau of Reclamation (JA. 83-84). No government materials or facilities were used in the work (JA 42). The firm received payment from Seattle for the work done and in turn paid individual engineers on an

hourly basis (JA 32-33, 79-80). The PUD itself had utilized the Savage organization (JA 85), including a Bureau employee (JA 90-91), in connection with its FPC licensed Box Canyon project.

In view of its long and successful employment of the Savage firm, the City turned to it in 1956 in connection with feasibility studies for Boundary. The PUD knew of the City's employment of Savage and of the participation of Mr. Winter and other Bureau employees in developing the Boundary design as early as 1956 (JA 16). In addition, the Savage design drawings, all marked "Approved, J. L. Savage, Consulting Engineer" (Tr. 17717) were included in the application filed with FPC in July of 1957. It was these drawings, and testimony in explanation and support of them, which were presented at the hearings through Messrs. Hammond and Winter.[2] Mr. Hammond, who had become a principal in the Savage firm upon his retirement from the Reclamation Bureau in 1955, had general supervision of the work for the City and testified on the dam design. Mr. Winter had responsibility, under Mr. Hammond, for the power features (JA 31, 81-82).

The work performed by Bureau employees for J. L. Savage and Associates on the Boundary project was authorized by long standing administrative regulations and practice of the Bureau of Reclam tion (JA 201). Bureau of Reclamation regulations in effect when this out-

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[2] Mr. Winter not only had Bureau permission to work on Boundary for the Savage firm but specific written permission to testify from the Assistant Secretary of the Interior. Mr. Winter's testimony, which was given under subpoena, was not in any official capacity as a Bureau employee but in the role of any federal employee called to testify as a private citizen in a legal proceeding concerning which he has knowledge. This was made clear in Mr. Winter's testimony (JA 29, 57) and in a letter from the Assistant Secretary of the Interior to the FPC Examiner, which noted that ". . . in testifying, Mr. Winter was not doing so on behalf of the Department, nor stating its position on any of the pending issues." (JA 90.)

side work was authorized provided that such employment was prohibited only if contrary to the interests of the government or if likely to conflict with official duties (JA 20-23). Each request had to be in writing, made a part of the employee's official records and be acted upon by "Regional Directors and heads of operating offices." (JA 41-42, 45.)

The work of the Savage firm was limited to design of a layout for the site and development of a cost estimate for executing the plan and did not extend to problems relating to protection of the mineral resources adjacent to the reservoir, about which the Department of Interior expressed concern. By prehearing conference stipulation, the hearing was divided into two separate phases, first, engineering and economic feasibility of the competing applications, and second, issues relating to geology and mining (JA 5-6). Mr. Winter's testimony and the work of other Bureau personnel was confined to the first part of the hearing.

The Reclamation Bureau and the Corps of Engineers agreed in 1950 that, "[w]ithin the field of multi-purpose storage projects and of power projects . . ." responsibility for conducting new investigations and of continuing investigations already launched should be assigned to the Corps for the Pend Oreille River below the confluence of the Clark Fork and to the Bureau upstream from that point (JA 24). The Bureau thus retained for the reach of the river in question only its traditional interest with respect to water supply for irrigation. Mr. Winter's testimony in no way related to irrigation, but was limited strictly to power features of the Boundary development (JA 57-58). The Bureau of Reclamation was in no way interested in the proceedings, except to recommend to the Commission inclusion in any license to be issued the usual stipulation concerning stream-flow for irrigation purposes which the Bureau routinely requests in all FPC projects (JA 149).

Contrary to its present position that the Reclamation Bureau had an "interest" in the hearings (Pet. 12), the PUD represented to the Commission in its own application for a license for low Z Canyon, before it challenged Mr. Winter:

> "Irrigation and reclamation will not be involved or affected by any proposed development of the Project." (JA 128.)

Based on the record, the Examiner ruled on the matter of governmental "interest":

> ". . . More specifically the Bureau of Mines of the Department of the Interior has an interest in the proceeding with respect to the possible damage to the mining resources of the area. This interest has not, however, any relationship to the work which Winter did for the City of Seattle. In other words, there is no conceivable conflict of interest here involved as those terms are used (even by counsel for PUD) to describe Sections 2 and 281 of Title 18 of the Criminal Code." (SJA 232.)

The Commission's order of September 6 holds:

> ". . . On the record before us, we can find no conflict of interest which as a matter of policy would impel us to exclude the testimony and exhibits in question. And apart from such a conflict of interest as might require their exclusion as a matter of policy, we know of no basis in law or equity for excluding said testimony and exhibits. We cannot conclude, as PUD would have us do, that the appearance of Mr. Winter and the admission into evidence of exhibits prepared by him and others constitute an assault upon the 'integrity of the administrative process' which requires dismissal of Seattle's application." (SJA 317.)

And the Court of Appeals, after concluding that:

> ". . . Neither the Government nor any of its agencies has attacked the grant of a license to Seattle as being contrary to the public interest because of the alleged violations of § 281, and no criminal action has been

instituted against the parties accused by PUD." (Pet. App. B-4.)

held:

> "We find nothing in the record to indicate that there was here the 'influence peddling' at which § 281 was aimed. No corrupt or venal motive is shown on the part of Seattle or the Bureau of Reclamation engineers, and it does not appear that the Commission gave any more weight to the material furnished by the government employees than if it had been prepared by others." (Pet. App. B-5.)

ARGUMENT

I. THE COURT OF APPEALS DECISION UPHOLDING SEATTLE'S RIGHT TO CONDEMN PUD PROPERTY WAS BASED ON WELL SETTLED PRINCIPLES

A. The Court of Appeals, In Holding That the State Statute Is Superseded By Section 21 of the Federal Power Act, Is Not In Conflict With the Washingfon Court.

The PUD's statement that, "[t]he Court of Appeals decision establishes a direct conflict between the Court of Appeals and the highest court of the State of Washington . . ." (Pet. 16) is refuted by the opinions appended to the PUD's petition. The Washington Supreme Court recognized in its opinion filed July 12, 1962, that the federal courts alone could determine whether RCW § 35.84.030, insofar as it might bar Seattle from performing under its FPC license, was overriden by the Federal Power Act. The majority said:

> "Whether the Federal Power Commission can confer powers of condemnation on cities, which the state legislature has, as a matter of policy, expressly prohibited the federal courts must determine. . . ." (Pet. App. C-4.)

Any doubt as to the meaning of the July 12 decision was resolved by the further opinion filed October 2, 1962, in which the court denied a motion to dismiss made by the

City on the strength of the judgment of the Court of Appeals entered August 30, 1962. Although the Washington court denied Seattle's claim that *Beezer* was mooted by the Court of Appeals judgment, it was careful to place its decision on the narrow ground that Seattle's motion was premature:

> "We are advised that Public Utility District No. 1 of Pend Oreille County will petition the Supreme Court of the United States to review, by certiorari, the circuit court's affirmance of the order of the Federal Power Commission; and, pending such review, we do not accept the conclusions of the circuit court as res judicata of the issues heretofore determined by this court in its opinion of [July 12], 1962. Nor do the conclusions of the circuit court render moot the issues presented to us for determination, unless, and until, the judgment of the circuit court becomes final and binding on Public Utility District No. 1 of Pend Oreille County, Washington." (Pet. App. D-2.)

Where is the conflict which calls for certiorari? The Washington court agrees that the effect of Section 21 (16 U.S.C. § 814) is solely for the federal courts to determine. The Court of Appeals has determined that effect. Further proceedings in *Beezer* could become significant only if this Court were to overturn both of the Court of Appeals alternative holdings: (1) that the state statute "even if according to its own terms it is applicable, cannot make it impossible for Seattle as a federal licensee to condemn under the federal statute"; and (2) that "it does not appear that the land owned by PUD and needed by Seattle is a part of the former's electric plant or system which the Washington statute protects from condemnation by a city or town." (Pet. App. B-9.)

The Washington court's concurrence that the question of supersedure is exclusively a federal one is further demonstrated by its latest opinion in the City of Tacoma's marathon battle to construct its FPC licensed dams on the Cowlitz River. In that opinion, *City of Tacoma* v. *Tax-*

payers, 160 Wash. Dec. 64, 371 P. 2d 938 (1962), the Washington court quoted with approval these conclusions by the trial judge:

"'Congress had the constitutional power to enact the Federal Power Act, and in so doing it intended to exercise its full jurisdiction to authorize the Federal Power Commission to supersede state laws purporting to prohibit or limit the construction of dams on navigable streams. By passing the act, Congress preempted the entire field and authorized the Power Commission to issue licenses for such construction upon such conditions as it deemed proper, and the Federal Power Commission, in issuing its license to the Plaintiff [city of Tacoma], exercised that right and *delegated to the Plaintiff, its licensee, as its agent and the agent of the Federal Government, the right and power to complete and to thereafter operate the Cowlitz Project* in accordance with the terms and conditions of its license.' (Conclusion of Law VIII)

"'There are no state laws, measures or regulations, including Initiative 25 (Chapter 4, Laws of 1961) that limit, control or affect in any way, or that bar the rights of the plaintiff to finance, construct, complete and operate the Cowlitz Project under the provisions of the Federal Power Act and in accordance with the terms and conditions of its Federal Power License (Project No. 2016.)' (Conclusion of Law IX)

"'The United States has exclusive and paramount jurisdiction over navigable waters under the commerce clause of the United States Constitution and under the supremacy clauses of the United States and Washington State Constitutions, and, therefore, any state laws, measures or regulations, *whether such laws be in the form of prohibitions or curtailment or limitation of powers, or in any other form*, are inapplicable to the Mayfield and Mossyrock hydroelectric project insofar as the same are in conflict with the provisions of the Federal Power Act or the terms and conditions of Plaintiff's license for said project or which would enable the State of Washington or any State official thereof or the citizen voters to exercise a veto over said project.' (Conclusion of Law X)" (emphasis added)

The foregoing excerpts from third *Tacoma* and *Beezer*, decided in 1962, manifest that the Washington court no longer subscribes to the language from its second *Tacoma* decision, decided in 1957, cited by PUD to bolster its "conflict" argument. (Pet. 17.) Thus the claim fails that there is need for the issuance of a writ by this Court to permit it to act as final umpire on conflicting decisions by federal and state courts. Denial of certiorari will drop the final curtain on a legal controversy now nearly ten years old.

B. The Court of Appeals Correctly Held That the "Abstention Doctrine" Should Not Be Applied

PUD complains that the Court of Appeals should have granted its motion to defer the federal proceedings to await final outcome of the *Beezer* case (Pet. 4, 22-24). It claims that the ruling by the Court of Appeals denying PUD's motion to defer (Pet. App. A-1) "has needlessly precipitated a constitutional conflict as to whether the federal or state sovereignty shall control the eminent domain powers of state subdivisions." (Pet. 23.)

If the Court of Appeals had granted the PUD's motion to defer, it would have acted contrary to the holding of this Court in *First Iowa Hydro-Elec. Coop.* v. *FPC*, 328 U.S. 152 (1946). In *First Iowa*, the District of Columbia Circuit did adopt the "abstention" course. It affirmed an FPC ruling deferring action on First Iowa's application until the Iowa court construed the state statutes in question (151 F. 2d 20). This Court reversed the Court of Appeals in an 8-1 decision. The arguments advanced in *First Iowa* by the Court of Appeals and by Mr. Justice Frankfurter in his dissenting opinion are the same ones the PUD makes in its petition here. The discussion by the PUD in the most general terms of the "abstention doctrine" is not helpful to it in the light of the specific holding of *First Iowa* that FPC should not delay action on a license application to await state court vindication of

an applicant's powers to perform under a license. Furthermore, deferral of these proceedings by the Court of Appeals would have been contrary to this Court's teaching in *City of Tacoma v. Taxpayers*, 357 U.S. 320, at 336 (1958), where the Court said:

> "... Hence, upon judicial review of the Commission's order, all objections to the order, to the license it directs to be issued, *and to the legal competence of the licensee to execute its terms*, must be made in the Court of Appeals or not at all. ..." (emphasis added)

No justification whatever exists for holding up the review procedure prescribed by Congress in the Federal Power Act to await the outcome of protracted collateral litigation. Application of the doctrine of abstention as requested by PUD would only add several years of unnecessary trials and appeals to a record which is already more than 21,000 pages in length.

C. The PUD's Arguments Are All Answered By the First Iowa, Tacoma and Tuscarora Decisions

PUD's plea should be recognized for what it is, a request that this Court replow old, well plowed fields. This Court held in *First Iowa* that requirements of state law which conflict with the express federal rights and powers granted by the Federal Power Act to licensees are void because of the veto power they create:

> "... Such a veto power easily could destroy the effectiveness of the federal act. It would subordinate to the control of the State the 'comprehensive' planning which the Act provides shall depend upon the judgment of the Federal Power Commission or other representatives of the Federal Government." (328 U.S. at 164.)

As the Court of Appeals below properly noted, *First Iowa* also holds that Section 9(b) of the Federal Power Act "does not in itself require compliance with state law; it

only empowers the Commission to require such evidence of compliance with state law as, in the Commission's judgment, would be 'appropriate to effect the purposes of a federal license on the navigable waters of the United States.'" (Pet. App. B-6.)

The PUD implies that *First Iowa* shows an intent to reserve to the states the matter of control of a licensee's eminent domain powers (Pet. 20). To the contrary, the Court expressly stated (328 U.S. at 181):

> "The detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls.[25] . . ."

In footnote 25, the Court lists, among other items ". . . § 21, federal powers of condemnation vested in licensee . . ."

The principle of supersedure applied in *First Iowa* was restated unmistakably in *City of Tacoma* v. *Taxpayers*, 357 U.S. 320, at 339-340 (1958) in that portion of the opinion quoted by the Court of Appeals in its decision below (Pet. App. B-8, 9). The right of the City "'. . . to receive and perform, as licensee of the Federal Government under the Federal Power Act, the federal rights determined by the Commission and delegated to the City as specified in the license . . .'" does not, in any respect, depend on state court construction of a state statute.[3] As this Court observed, in quoting approvingly in *Tacoma* from the Ninth Circuit's opinion:

> ". . . 'Consistent with the First Iowa case, supra, we conclude that the State laws cannot prevent the Federal Power Commission from issuing a license *or bar the licensee from acting under the license* to build a dam on a navigable stream since the stream is under the dominion of the United States.' Id. 207 F. 2d at 396. (Emphasis added.)" (357 U.S. at 340.)

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[3] PUD's references to a limitation in Seattle's "charter" (Pet. App. 18, 21) are misleading at best. Seattle's charter contains no such limitation. (Tr. 17631-17702.)

PUD urges that RCW § 35.84.030 differs from the state laws under consideration in the *First Iowa* and *Tacoma* cases in that it is not a "veto" law (Pet. 22, fn. 11). There can be no doubt that this state statute, as PUD construes it, would give the state a veto power over the federally licensed project. That is precisely the result PUD seeks to achieve. The PUD is not here complaining that FPC should have licensed PUD's Z Canyon project; it asks that the City's Boundary project, found best adapted to comprehensive development, not be constructed.

If the state statute governed and were construed as PUD would have it, the Pend Oreille River would never be developed. As PUD points out, Washington law (RCW § 54.16.020) protects utility systems of cities from condemnation by PUDs (Pet. 7, fn. 4). The record shows that Seattle had already acquired property in the Boundary project area by the time of the FPC hearing (Exs. 25, 26, Tr. 17797-17800). Under PUD's interpretation of Washington law, this property would be immune from condemnation by PUD, even if the PUD were licensed by the Commission. This, coupled with PUD's construction of RCW § 35.84.030 as having a converse affect upon PUD properties, would, if controlling, bar construction by any public agency in the State of Washington. Furthermore, under Washington law investor owned power companies may not condemn municipally owned utility properties.[4]

If every piece of pasture, shoreland or unimproved right of way which happened to be acquired by a utility, as this property was by PUD, incidental to a different project (Box Canyon), were considered a "part" of its electric

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[4] Under Washington law (RCW § 80.32.060) the eminent domain powers of investor owned power companies are the same as those granted (in RCW § 81.36.010) to railroads. Railroads may not condemn municipally owned property. See *State ex rel Northern Pac. Ry. Co.* v. *Superior Court*, 136 Wash. 87, 238 Pac. 985 (1925).

system, a complete stalemate would result. If PUD's argument were once accepted, development, public or private, could be blocked forever and the purpose of the Federal Power Act, ". . . to make progress with the development of the long idle water power resources of the nation . . .",[5] would be nullified.

This Court recently reconfirmed, in *FPC* v. *Tuscarora Indian Nation*, 362 U.S. 99, 123 (1960), that Section 21 of the Act confers federal condemnation powers on licensees:

> ". . . we . . . hold that Congress, by the broad general terms of § 21 of the Federal Power Act, has authorized the Federal Power Commission's licensees to take lands owned by Indians, as well as those of all other citizens, when needed for a licensed project, upon the payment of just compensation. . . ."

Hence the arguments made now by the PUD in support of certiorari have been rejected at least three times by this Court, in its decisions in the *First Iowa*, *Tacoma* and *Tuscarora* cases. Unless these precedents are to be overturned, no purpose would be served in granting the PUD's petition.

D. The Court of Appeals Properly Held That the PUD's Lands Are Not Part of Its Electric System

PUD finds it "astonishing" that the Court of Appeals, as an alternative ground for its holding on the condemnation issue, decided that the PUD's lands were not part of its "electric plant or system" (Pet. 10). We in turn marvel at the PUD's surprise, since for eight long years the PUD urged FPC, through numerous filings,[6] and then

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[5] *First Iowa Hydro-Elec. Coop.* v. *FPC*, 328 U.S. 152, 171 (1945).

[6] Thus at page 6 of its "Petition for Intervention" filed August 27, 1957 upon the City's FPC application, PUD alleged:

> "Because of this statute [RCW § 35.84.030] the City of Seattle cannot condemn the properties and rights at or above Z Canyon. They constitute a 'part' of the electric power and

the Court of Appeals, to interpret the state statute in PUD's favor. Only after FPC, in September, 1961, had definitively refused to interpret the statute as barring Seattle did the PUD commence shopping (in November, 1961) for a favorable holding in the Washington state court.

PUD's statement that "FPC had expressly refused to decide or make findings" on the state law question (Pet. 10) posed by PUD is not accurate. The Examiner in denying PUD's motion to dismiss ruled:

> "The properties with which we are here concerned do not include any which were or are now being used in connection with the PUD's Box Canyon Project. On the other hand, they are also indispensable to the construction of either of PUD's alternative projects in the event that a license or licenses are issued therefor. There is, however, no evidence that such properties are otherwise important, necessary or useful as parts of the PUD's electric power and light plant or electric system." (SJA 229)

FPC adopted the Examiner's finding and decision on this question (SJA 220-221) which it characterized as a basic issue:

> "1. Whether, by reason of the laws of the State of Washington, Seattle is unable to acquire the lands

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light system owned by Public Utility District No. 1 of Pend Oreille County, Washington, which the District plans to use in the future . . ." (Tr. 19818).

As noted by Judge Donworth in his dissent in the *Beezer* opinion of July 12, 1962 (Pet. App. C-6), the PUD had made an identical allegation in January, 1954, in its "Petition for Intervention" in opposition to Seattle's application for preliminary permit.

In its "Motion to Dismiss City of Seattle Application" filed December 1, 1958, PUD made the same allegations. After reciting that the lands in question were part of its "electric power and light system" PUD concluded, "[w]ith respect to the issue presented here, the duty of the Commission is clear. For the foregoing reasons, the Motion to Dismiss the City of Seattle's application should be granted and the application dismissed." (Tr. 20291-20292).

necessary for it to effect the purposes of the license issued to it?" (SJA 219.)

In its further opinion, filed upon the PUD's application for rehearing, the Commission pointed out that because Seattle's right to acquire the PUD properties was clear under Section 21, decision of the state law question posed by the PUD was actually unnecessary to its decision (SJA 316).

As to PUD's contention that "the record furnished no grounds for deciding the state law question adversely to petitioner" (Pet. 10), the pictures PUD put in evidence (JA 130-132) show the wild character of the Z Canyon lands. They speak more eloquently than volumes of testimony in disproving the PUD's contention that the property in question is part of its "electric plant or system."

II. THE SO-CALLED CONFLICT OF INTEREST QUESTION PRESENTS NO ISSUE WARRANTING REVIEW BY THIS COURT

A. The "Conflict of Interest" Issue Posed By Petitioner Rests On Factual Assumptions Rejected By the Commission and Court Below After Exhaustive Review.

PUD's attempt to have this Court review what it paints as broad legal questions arising out of "violations of federal conflict of interest law and policy" assumes facts rejected below as against the weight of the evidence. Contrary to the basic premise of PUD's argument, the Examiner and the Commission found that the evidence in the record did not reveal conduct "within the contemplation of" Section 281 (JA 232). The fallacy of PUD's reasoning is shown by its statement that, "the issue is whether a federal regulatory agency is permitted to reject this federal policy [against conflict of interest] totally, as FPC did here." (Pet. 27.) FPC, as the Court of Appeals recognized, did not reject the federal policy. Rather it found that, "there is no conceivable conflict of interest here involved as those terms are used (even by counsel for

PUD) to describe Sections 2 and 281 of Title 18 of the Criminal Code." (SJA 232.) This finding was expressly affirmed by the Court of Appeals (Pet. App. B-3). As a brief review will show, it is solidly supported by the massive factual record developed on this issue.

The work performed on the Boundary project for J. L. Savage and Associates by Bureau of Reclamation employees in their off duty hours had no relationship to any interest of the Department of Interior in the proceedings before the Commission. The work performed was not connected in any way with the question of possible mine damage, which was treated in an entirely separate phase of the hearing (JA 5-6). In fact, as appears from the record, Mr. Winter's duties with the Bureau were entirely foreign to the development of the Pend Oreille River. His agency had long since relinquished jurisdiction of any federal development of the stream to the Corps of Engineers, retaining only its interest in water supply for irrigation upstream, to which Mr. Winter's testimony bore no remote relevance. Thus Mr. Winter did not and indeed could not purport to act in any way for the government in connection with the proceedings below. PUD itself introduced a letter from the Assistant Secretary of the Interior permitting Mr. Winter to testify before FPC with the express understanding that "Mr. Winter was not doing so on behalf of the Department, nor stating its position on any of the pending issues." (JA 89-90.)

In sharp contrast stands the activity of Mr. Wenzell involved in *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520 (1961). Mr. Wenzell carried on a dual role of advising the government and advising the sponsors of the project and his associates at First Boston without the knowledge or approval of the government. As the Court there noted "he was 'working both sides of the street,' " at the same time on the same transaction (p. 543).

In addition to finding no conflict of interest the court

below ruled that the evidence showed no improper influence:

> "We find nothing in the record to indicate that there was here the 'influence peddling' at which § 281 was aimed. No corrupt or venal motive is shown on the part of Seattle or the Bureau of Reclamation engineers . . ." (Pet. App. B-5.)

This finding resulted from the uncontroverted facts showing that Mr. Winter and other Bureau people were not hired because they might influence anyone through their federal status but were hired by the Savage firm to work on Boundary because they were able engineers with long familiarity with City of Seattle engineering requirements. Their usual work for the government in Denver was so removed from the decisional processes of the FPC as to give them no more influence or opportunity for influence on FPC decision-making or policy than any engineer in private practice. Their design ideas, like those submitted by the PUD, were subjected to the crucible of public hearing and cross examination.

Nevertheless, the PUD argues:

> ". . . No one now can say how extensively their participation affected the examiner (who did state he found Winter 'most impressive'—(p. 15, *supra*), or the FPC staff, or others in FPC, on questions of cost, power production, financial feasibility, mine damage, and other elements of the two competing applications on which comparison was being made. . . ." (Pet. 29)

No speculation is necessary. The FPC staff engineers rated the Savage design third best of the three layouts for a high dam presented to them. They gave the PUD's own High Z Canyon project a benefit-cost rating of 2.24 as contrasted with 2.01 for the Savage design. Indeed, it was this unfavorable comparison which caused the City to submit

on rebuttal a rock-fill dam and underground powerhouse layout, developed by Raymond A. Hill and the Bechtel Corporation as an alternative to the concrete dam-surface powerhouse design presented by Hammond and Winter in the City's case in chief. The FPC found the Hill-Bechtel design superior to both the PUD's High Z and the Savage Boundary plans.

PUD does not challenge the findings below that the record establishes absolutely no "influence peddling" but contends that the statute is not concerned with this at all. To the contrary, this Court has construed this element as the heart of the statute. In *Burton* v. *United States*, 202 U.S. 344 (1906), which upheld the conviction of a United States Senator for receiving money to represent a private corporation before the Post Office Department, this Court said:

> ". . . *Evidently the statute has for its main object to secure the integrity of executive action against undue influence* upon the part of members of that branch of the government, whose favor may have much to do with the appointment to, or retention in, public position of those whose official action it is sought to control or direct. . . ." (p. 368; emphasis added.)

The interpretation given Section 281 in the *Burton* case was recently repeated by the Attorney General in an opinion released March 7, 1962:

> "The general purpose and thrust of the statute are clear from its language and from its legislative history. It was designed to prohibit a Member of Congress or a Government officer or employee from using whatever influence or purported influence he might have anywhere in the Government departments or agencies as a means of obtaining income from outside sources . . .
>
> ". . . The Statute thus manifests that its primary objective is to prevent the corrupt selling of influence."

(42 Ops. Att'y. Gen. No. 6 dated January 31, 1962, printed slip opinion, p. 9-10).[7]

Finally, PUD insists that the record shows at least a technical violation (Pet. 29). But neither the Examiner, the Commission nor the Court of Appeals found any violation of any type (Examiner, JA 232; Commission, JA 220, 317; Court of Appeals, Pet. App. B-4, B-5). In the absence of any finding of violation and in the light of express findings that the record shows "no conceivable conflict of interest" or "influence peddling" it is difficult to see how there exists any legal policy question requiring review on certiorari.

B. The Court of Appeals Correctly Held That the Public Interest Did Not Require the Refusal of a License

Nowhere in its petition does the PUD mention the alternate holding of the Court of Appeals, based on the *Dixon-Yates* case, that the Government may find it contrary to the public interest to refuse or void a license for a needed hydro-electric project even assuming Section 281 applied:

> "But the Dixon-Yates case does not hold, nor does any other authority to our knowledge, that a transaction is automatically void because there may have been involved in it a technical violation of the conflict of interest statutes. Neither the Government nor any of its agencies has attacked the grant of a license to Seattle as being contrary to the public interest be-

[7] The material quoted by PUD from the same opinion by the Attorney General (Pet. 26) must be read in the context of such direct statements elsewhere in the opinion as, "the purpose for which this statute [Section 281] was written . . . is, to prevent the sale of influence by Congressmen and regular Government employees . . ." (p. 10), "the conduct aimed at by the statute—i.e., influence selling . . ." (p. 12) and "clearly the statute, as indicated by the severe penalties it imposes, is aimed at venal conduct." (p. 13)

cause of the alleged violations of § 281. . . ." (Pet. App. B-4.)

The PUD argues that since the Commission did not agree with it that the alleged violations of Section 281 required automatic exclusion of otherwise competent and relevant evidence, the Commission ignored Section 281. The FPC did not ignore the statute; rather, after careful consideration of the facts and law, it rejected the conclusions which the PUD asked it to draw. The record demonstrates that both the Examiner and the Commission were keenly aware of their duty to develop a full record concerning the PUD's contention and to give the matter whatever weight it deserved in reaching a decision. The Examiner repeatedly emphasized this point during the hearing. For example, he agreed that the Commission could not "close their eyes" to Section 281 (JA 26), and that the Commission "must take cognizance of" the policies underlying Section 281 (JA 27, 36).

In its decision the Commission had to determine what, if any, relevance Section 281 and the policy underlying it had, under the facts presented, to the duties delegated to FPC by Congress. Section 10 of the Federal Power Act (16 U.S.C. § 803) authorizes the Commission to issue licenses for the development of the nation's water resources for projects found "in the judgment of the Commission [to] be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce . . ." The Act was designed not merely to regulate existing conditions but actively to promote the development of the nation's water resources. *First Iowa Hydro-Elec. Coop.* v. *FPC*, 328 U.S. 152, 180 (1946). In recognition that this new broad policy would require the Commission to consider all relevant evidence, Congress vested the Commission with broad subpoena and other powers to acquire the full facts

necessary for the exercise of its licensing jurisdiction. (See 16 U.S.C. §§ 793, 797(e), 803(a), 825f(a) and 825f(g).

PUD's attempt to exclude otherwise competent and relevant evidence by invocation of Section 281 went to the heart of the Commission's powers to effectuate the policies and purposes of the Federal Power Act for the development of the nation's water resources. The PUD in effect would have Section 281 veto all these other statutes and important policies which the Commission must consider, regardless of their effect upon the public interest. This Court has on several occasions rejected similar arguments attacking agency findings. *FCC* v. *WOKO, Inc.*, 329 U.S. 223, 229 (1946); *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 80 (1944); and *SEC* v. *Chenery Corp.*, 332 U.S. 194, 204-207 (1947).

The court below noted that Section 281, "a criminal statute, prescribes no civil or administrative sanctions." (Pet. App. B-5.) Its construction of *Dixon-Yates* as vesting the Government with an option to consider other public policies in determining whether to disavow a transaction has now been expressly confirmed by Congress. The Act of October 23, 1962 (76 Stat. 1119, 1125-26) which repealed Section 281 and other "conflicts" statutes in a thoroughgoing revision, provides:

> "218. In addition to any other remedies provided by law the President or, under regulations prescribed by him, the head of any department or agency involved, *may* declare void and rescind any contract, loan, grant, subsidy, license, right, permit, franchise, use, authority . . . by or for any agency of the United States or officer or employee of the United States or person acting on behalf thereof, *in relation to which*

there has been a final conviction for any violation of this chapter . . ." (emphasis added.)

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 611

PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY, WASHINGTON, PETITIONER

v.

FEDERAL POWER COMMISSION AND CITY OF SEATTLE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion and order of the Federal Power Commission (S.J.A. 218–225),[1] and the initial decision of its presiding examiner (S.J.A. 225–309) will be reported at 26 F.P.C. 54; its order denying applications for rehearing and modifying its original order (S.J.A. 311–321) will be reported at 26 F.P.C. 463. The opinion of the court of appeals (Pet. App. B) is reported at 308 F. 2d 318.

[1] "S.J.A." refers to the Supplemental Joint Appendix and "J.A." to the Joint Appendix before the court below.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 1962. The petition for a writ of certiorari was filed on November 24, 1962. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1) and Section 313(b) of the Federal Power Act (16 U.S.C. 825*l*(b)).

QUESTIONS PRESENTED

1. Whether the federal power of eminent domain conferred upon licensees of the Federal Power Commission by Section 21 of the Federal Power Act to acquire lands necessary for a hydroelectric project may be restricted by state law.

2. Whether a license granted by the Commission to the city of Seattle must be set aside on the ground that Bureau of Reclamation employees performed technical services for Seattle in connection with the project designs on their own time, were compensated on an hourly basis, and one testified concerning the power aspects of the original plans, when the Commission, on the basis of all the facts, decided that evidence resulting from these activities was not the result of any corruption, was relevant, and should be considered and that the license was in the public interest.

STATUTES INVOLVED

Sections 9(b) and 21 of the Federal Power Act (16 U.S.C. 802(b), 814), former 18 U.S.C. 281 (1958 ed.),[2] and Revised Code of Washington (1951), § 35.84.030, are set forth in Appendix E of the petition.

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[2] Section 2 of the Act of October 23, 1962, 76 Stat. 1119, 1126, repealed 18 U.S.C. 281 and replaced it by 18 U.S.C. 203 which provides in part:

STATEMENT

Petitioner (hereinafter called PUD), a public utility district organized under the laws of the State of Washington, seeks review of a decision of the Court of Appeals for the District of Columbia Circuit

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(a) Whoever, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receives or agrees to receive, or asks, demands, solicits, or seeks, any compensation for any services rendered or to be rendered either by himself or another—

* * * * *

(2) at a time when he is an officer or employee of the United States in the executive, legislative, or judicial branch of the Government, or in any agency of the United States, including the District of Columbia, in relation to any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest, before any department, agency, court-martial, officer, or any civil, military, or naval commission, or

(b) Whoever, knowingly, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly gives, promises, or offers any compensation for any such services rendered or to be rendered at a time when the person to whom the compensation is given, promised, or offered, is or was such a Member, Commissioner, officer, or employee—

Shall be fined not more than $10,000 or imprisoned for not more than two years, or both; and shall be incapable of holding any office of honor, trust, or profit under the United States.

The new statute also added an entirely new section, 18 U.S.C. 218, which gives the government a limited right, in addition to existing remedies, to rescind licenses and contracts when 18 U.S.C. 203 has been violated and a conviction obtained (for the text of 18 U.S.C. 218, see *infra*, p. 22).

(Judges Miller, Bazelon, and Bastian) affirming an order of the Federal Power Commission. The order granted to the city of Seattle a license for the construction and maintenance of a hydroelectric project (the Boundary project) on the Pend Oreille River, a navigable water of the United States. By the same order, the Commission denied PUD's application for a license to construct a smaller project at Z Canyon. The two proposed projects were mutually exclusive. In a subsequent order, the Commission modified the license in a manner not relevant to this case and denied PUD's application for rehearing.

Petitioner does not now attack any of the findings on which the Commission denied PUD's application and licensed Seattle's Boundary project. The facts relevant to the two legal questions which petitioner seeks to have this Court review may be summarized as follows:

Eminent domain.—In 1952 PUD sought to purchase certain land for the construction of its Box Canyon project (S.J.A. 229), for which it had secured a Federal Power Commission license (Project No. 2042, 11 F.P.C. 786). To obtain this land, PUD was required to purchase the entire 190 acres held by the owner. The tract purchased included land which was not used in the Box Canyon project, but which would be essential for either Seattle's Boundary project or for PUD's alternative Z Canyon project. The land is not now being used and has no apparent utility or value other than in connection with a hydroelectric project downstream from Box Canyon (S.J.A. 229).

Since PUD is unwilling to sell to Seattle the land

necessary for the Boundary project, Seattle stated in the proceeding before the Commission that it intended to acquire it under Section 21 of the Federal Water Power Act, which authorizes licensees of the Commission to obtain land by eminent domain. PUD contended, on the other hand, that the Commission could not properly license Seattle's Boundary project because Seattle's condemnation of PUD's land would violate a state statute (Wash. Rev. Code (1951), § 35.84.030) which forbids any city from acquiring by eminent domain any part of the "electric power and light plant or electric system" of a public utility district. The Commission rejected PUD's contention, holding that Section 21 would enable Seattle to condemn land necessary for performance under any license granted by the Commission under the Act (S.J.A. 229, 316). The Commission also adopted the examiner's decision, in which he found that the property involved did not appear to be part of PUD's electric plant or system and was not useful except in connection with either Seattle's or PUD's proposed projects (S.J.A. 221–222, 229). On application for rehearing, the Commission stated that it need not decide the question of state law since Section 21 made state law inapplicable (S.J.A. 316). The court of appeals sustained the Commission's ruling as to Section 21. In addition, the court held that the property in question was not any part of PUD's electric system within the restrictive proviso of the state statute (Pet. App. B, p. 9).

Meanwhile, on November 30, 1961, almost three months after the Commission's final decision denying

PUD's application for rehearing and two months after PUD's petition for review had been filed in the court of appeals, a taxpayer of Pend Oreille County commenced a declaratory judgment action against Seattle in a state court (Pet. App. C, p. 12). PUD intervened as a plaintiff in that litigation. The trial court granted Seattle's motion for summary judgment, holding that the action constituted "an impermissible collateral attack" on the FPC order, as to which the Court of Appeals for the District of Columbia Circuit had exclusive jurisdiction (FPC Answer to Motion for Stay, App.). On July 12, 1962, after argument but prior to the decision below in the present case, the Supreme Court of Washington reversed the decision of the trial court and remanded for "determination of whether the property of the P.U.D., which the city of Seattle now takes the position it must condemn, is an 'electric power and light plant or electric system, or any part th reof.'" *Beezer* v. *City of Seattle*, 373 P. 2d 796, 798 (Pet. App. C, p. 5). The court declined to decide the effect of Section 21 of the Federal Power Act, stating that "[w]hether the Federal Power Commission can confer powers of condemnation upon cities, which the state legislature has, as a matter of policy, expressly prohibited, the federal courts must determine" (Pet. App. C, p. 4). In a dissenting opinion, three of the nine participating judges stated that the issues presented by PUD and the taxpayer were within the exclusive jurisdiction of the court in which PUD's petition for review was pending (Pet. App. C, pp. 5–18).

PUD then moved the court of appeals to defer its decision until final disposition of the state court litigation or, in the alternative, to remand the proceeding to the Commission. This motion was denied (Pet. App. A, p. 1). Instead, the court of appeals passed upon the question which the Washington court had recognized to be the exclusive concern of the court of appeals (as well as on the state-law question), and held that, under Section 21 of the Federal Power Act, Seattle would be able to acquire the lands by federal eminent domain (Pet. App. B, pp. 1; 5–9).

Seattle moved in the Washington Supreme Court for dismissal of the appeal on the basis of the decision by the court of appeals. The state court (again by a 6 to 3 vote) denied this motion because PUD stated its intention to seek certiorari in this Court and the present court of appeals decision would not be *res judicata* or render the state litigation moot "unless, and until, the judgment of the circuit court becomes final and binding * * *." *Beezer* v. *City of Seattle*, 375 P. 2d 256, 257 (Pet. App. D, pp. 1–3).

Engineering Services.—Since 1947, J. L. Savage & Associates, an engineering firm, has designed several hydroelectric projects for Seattle, which is the firm's principal client (J.A. 15, 77; S.J.A. 230). In 1954 Seattle obtained a preliminary permit from the FPC for the Boundary site under Sections 4(f), 5, and 7(a) of the Federal Power Act (16 U.S.C. 797(f), 798 and 800(a)). 13 F.P.C. 1353. Early in 1956, the Savage firm was retained by Seattle to prepare plans for the project (S.J.A. 230–231). Seattle allowed the firm no discretion, however, either as to the site of the dam or the height of the reservoir,

since these crucial features had already been decided upon by the city (J.A. 75).

John Hammond, the head of the Savage firm, assumed overall responsibility for the project and in addition undertook direct supervision of the design of the dam (J.A. 81). Working with him on various aspects of the project were some fifteen other engineers who were regularly employed elsewhere (J.A. 78). These men were supplementing their income by performing professional engineering services on their own time for hourly compensation (J.A. 79).

The Savage firm retained the services of, and assigned responsibility for design of Boundary's power aspects to Ireal A. Winter, a distinguished and highly qualified specialist in hydraulic machinery (S.J.A. 230–231). Winter was a permanent employee of the Bureau of Reclamation, where he was in charge of preparing specifications for power plant equipment in the Bureau's projects (J.A. 62). While working on the Boundary project, he supervised a team of ten engineers and technicians, some of whom were also employed in the Bureau of Reclamation. These men worked in their off-hours in their own homes. For example, Winter, who attended a few consultations in the offices of the Savage firm, generally did his work on Saturdays, meeting at home with his group to discuss the plans (J.A. 34–35, 41).

When Savage's designs had been completed, the city undertook the measures necessary to bring its formal proposal before the Commission. Its staff engineers reviewed and modified the designs (J.A. 76), it prepared an application which incorporated them, and

its Superintendent of Lighting filed the application on July 29, 1957 (S.J.A. 257).[3]

During the proceedings before the Commission, the original Savage designs were again substantially modified. Engineers on the Commission's staff, who were technical witnesses in the hearings, recommended that the plan submitted by the city be revised (S.J.A. 262–263, 265, 266). And in February 1959, the city requested another independent engineer, Raymond A. Hill, to review the matter for the purpose of appearing as a technical witness. Mr. Hill felt that there was a preferable alternative to the Savage plans. At Seattle's request, he and an associate, Augustine A. Ayers, prepared designs for both the dam and the power plant. For reasons of cost, they considered their designs to be superior to the Savage plans (J.A. 111–118). Seattle later filed an amended application submitting the Hill-Ayers designs as alternatives to its original proposals (S.J.A. 263–264). The plan which was ultimately recommended by the examiner and licensed by the Commission calls for a composite of the Savage-designed dam and the Hill-Ayers power plant (S.J.A. 264, 305–306).

Early in the hearings on its original plans, Seattle called upon the developers to explain them. Hammond testified as to the proposed design for the dam and Winter explained the power features (S.J.A. 231). PUD demanded exclusion of Winter's testimony and of any evidence based upon work done by

[3] After the application had been filed, Mr. Winter performed a few other technical services for the Savage firm which related to the Boundary project (J.A. 73).

him for the city because he was an employee of the Bureau of Reclamation. As a result, the details of Winter's services to the city occupied many days of the hearing (S.J.A. 230–231). Winter made it clear from the outset that he was not testifying in any respect as a representative of the Bureau of Reclamation (J.A. 29, 57).

The position of the Department of the Interior respecting the merits of Seattle's proposal reflected the varying interests of its component bureaus. Thus, after the hearings—long after the government engineers had finished their technical work—the Bureau of Mines and the United States Geological Survey took a position opposing any project on this stretch of the Pend Oreille. The Fish and Wildlife Service was satisfied that natural resources in its jurisdiction would not be adversely affected by any development, but requested that the license include the usual clause requiring cooperation with it (J.A. 144, 164). The National Park Service expressed no objection, but also requested the usual cooperation clause (J.A. 144, 164). The Bureau of Reclamation's interest in the Pend Oreille was limited by a 1949 agreement allocating primary responsibility for investigation of multi-purpose storage facilities on that river to the Corps of Engineers except to the extent irrigation functions were involved. Under this same agreement, however, it was responsible for investigation of multi-purpose storage facilities on the Clark Fork, a separate component of the same river system (J.A. 50–51; S.J.A. 227). At the Bureau's request, Interior advised the Commission

that the license should also include a provision requiring that the project not be operated so as to conflict with the use of waters for irrigation or with the use of the waters of the Clark Fork (J.A. 143, 149, 165).

The record does not indicate any relationship whatever between Winter's official duties, supervising power equipment specifications for the Bureau of Reclamation, and the Bureau's interests in the Pend Oreille (S.J.A. 232). After reviewing Winter's contribution in detail, and noting that the only opposition to the project from the Department of the Interior came from the Bureau of Mines and the Geological Survey, the examiner held that there was no conceivable conflict of interest.

PUD took exceptions to the examiner's ruling, urging before the full Commission that Seattle be totally disqualified as an applicant and, alternatively, that all of Seattle's evidence which was based upon the private services of Bureau of Reclamation employees be excluded. The Commission, adopting the examiner's view, overruled this exception (S.J.A. 220, 316–317). Its ruling was unanimously affirmed by the court below, which agreed that nothing in this record indicated "that there was here the 'influence peddling' at which Section 281 was aimed" (Pet. App. B, pp. 5, 11).

ARGUMENT

1. Section 21 of the Federal Power Act expressly grants to any FPC licensee the power to acquire by eminent domain the "property of others necessary to the construction, maintenance, or operation of any dam [or] reservoir * * * in conjunction with an im-

provement which in the judgment of the commission is desirable and justified in the public interest." Section 35.84.030 of the Revised Code of Washington grants the power of eminent domain to any city owning its own electric power and light plant, but prohibits the use of such authority for the condemnation of "the electric power and light plant or electric system, or any part thereof, belonging to or owned or operated * * * by a public utility district." PUD contends that Seattle's power under Section 21 is limited by state law. Since, PUD argues, application of the state statute to the lands in question is uncertain, PUD also asks that Seattle's license be suspended while the uncertainties are resolved by litigation begun in the Washington courts after the license was issued.

PUD does not deny that Seattle is a municipality competent under state law to carry on the business of developing and distributing power, or that it is generally qualified to build and operate power facilities on streams under federal dominion. See Section 3 (5) and (7) and 4(e) of the Federal Power Act, 41 Stat. 1063, 1064, 1065, as amended, 16 U.S.C. 796(7), 797(e). Yet it contends that because Seattle is a municipality, its powers of eminent domain as a federal licensee under Section 21 are subject to special controls by the State. These same controls, it concedes (Pet. 22), would be inapplicable to non-municipal licensees. The result of PUD's contention would be a kind of dual standard, with one power under Section 21 for private corporations and another for municipal corporations. Section 21 discloses no

such distinction among federal licensees. Its plain terms confer uniformly upon all federal licensees the same powers of eminent domain. Moreover, the distinction advanced by PUD is in direct conflict with the avowed purpose of Congress to prefer municipal bodies over private parties as FPC licensees. See Section 7(a) of the Federal Power Act, 41 Stat. 1067, 16 U.S.C. 800(a).

PUD's argument simply fails to recognize that there are two separate and distinct sources, federal and state, of power to acquire property by eminent domain. To achieve federal purposes, the Congress may confer such authority upon both private and public creatures of the states. Upon whomever conferred, this grant of federal eminent domain "is complete in itself. It can neither be enlarged nor diminished by a State. Nor can any State prescribe the manner in which it must be exercised. The consent of a State can never be a condition precedent to its enjoyment." *Kohl* v. *United States*, 91 U.S. 367, 374. Even the lands of municipal corporations, such as PUD may be taken under it. *United States* v. *Carmack*, 329 U.S. 230; cf. *United States* v. *Tuscarora Indian Nation*, 362 U.S. 99.

In *Washington Department of Game* v. *Federal Power Commission*, 207 F. 2d 391, 396 (C.A. 9), certiorari denied, 347 U.S. 936, the court of appeals held that "state laws cannot prevent the Federal Power Commission from issuing a license or bar the licensee from acting under the license to build a dam on a navigable stream since the stream is under the dominion of the United States." Subsequently, this Court

held that the Ninth Circuit's determination was *res judicata* on the issue whether the City of Tacoma acquired, contrary to state law, "federal eminent domain power and capacity to take, upon the payment of just compensation, a fish hatchery owned and operated by the State of Washington, by virtue of the license issued to the City under the Federal Power Act and more particularly § 21 thereof." *City of Tacoma* v. *Taxpayers*, 357 U.S. 320, 323; see *id.* at 338–341. In short, state law does not limit Seattle's power to acquire property under Section 21. Seattle possesses this authority simply because it is a federal licensee.

PUD's reliance (Pet. 21) upon Section 9(b) of the Act, 41 Stat. 1068, 16 U.S.C. 802(b), is clearly without merit. This Court has held that (*First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission*, 328 U.S. 152, 177–178):

> [Section 9(b)] does not itself require compliance with any state laws. * * *

Later in the opinion, the Court stated that "[t]he detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls" (*id.* at 181). The Court concluded that, despite a state statute forbidding the diversion of water from a stream without returning it, the Commission should have issued the license allowing such diversion because the statute was superseded,[4] rather than deferring action on the ap-

[4] In addition, we doubt that Section 9(b) applies at all to Section 21's express grant of power of eminent domain. Sec-

plication until the state courts had construed the state statute. See also *City of Tacoma* v. *Taxpayers, supra; Washington Department of Game* v. *Federal Power Commission, supra,* 207 F. 2d at 395–396.[5] Consequently, the Commission and the court of appeals were correct in determining that Seattle's power of eminent domain under Section 21, was not limited by state law (S.J.A. 316; Pet. App. B, pp. 5–9). Indeed, the Supreme Court of Washington expressly recognized that the effect of Section 21 was a question of federal law within the exclusive jurisdiction of the federal courts and that, if the court of appeals' decision became final, it would moot the litigation in the state courts. *Beezer* v. *City of Seattle, supra* (Pet. App. C, p. 4; Pet. App. D, p. 2). Accord, *City of Tacoma* v. *Taxpayers of Tacoma,* 371 P. 2d 938 (Wash. Sup. Ct.).

Thus, neither the Commission nor the court of appeals needed to reach the question of Seattle's powers of eminent domain under state law. The court of appeals' holding on this point—that, even assuming

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tion 9(b) concerns only state laws dealing specifically with "bed and banks," "appropriation, diversion, and use of water for power purposes," and "the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license * * *."

[5] The cases discussed above implicitly establish that, contrary to PUD's contention, it is constitutional for Congress to give a federal licensee the power of eminent domain without regard to state law. If the license is constitutionally authorized, this proposition is beyond dispute. See, *e.g., California* v. *Pacific R. R. Co.*, 127 U.S. 1; *City of Davenport* v. *Three-Fifths of an Acre of Land*, 252 F. 2d 354 (C.A. 7).

state law applied, it did not prohibit Seattle from acquiring the lands in issue by eminent domain—is merely an alternative ground of decision. That being so, there can be no ground for insisting that the court of appeals should have stayed its hand pending the completion of the state court proceedings. By the same token whatever differences may exist on these issues of state law between the views of the Washington Supreme Court in *Beezer* v. *City of Seattle, supra* (Pet. App. C, pp. 3–4) and the court of appeals in this case do not justify review by this Court.[6]

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[6] In fact, no actual conflict—as to whether, assuming state law is applicable, Seattle has power of eminent domain concerning these lands—exists between the Washington Supreme Court and the court of appeals. The former has not determined that Seattle has no such power. Since the state court was acting in response to motions for summary judgment, without evidence, it did not undertake to decide the factual issue, but remanded the case for trial on that issue. In the Commission proceeding, on the other hand, PUD submitted the issue of state law to the Commission, evidence was taken, and the examiner found (S.J.A. 229) that the property involved was not being used in connection with PUD's existing Box Canyon project and was not useful except in connection with either Seattle's or PUD's proposed projects. The Commission adopted the examiner's findings (S.J.A. 221–222). These findings, which PUD has not challenged, necessarily lead to the conclusion of the court of appeals that the land in issue was not part of PUD's electric power plant or system and therefore state law could not limit Seattle's power of eminent domain as to these lands, even if state law were applicable.

Besides the reason given by the court of appeals, we believe that state law, even if applicable, would not have prevented Seattle's exercise of eminent domain because the provision relied on by PUD is merely a limitation on a grant of eminent domain power made by the State. It does not even purport to forbid the exercise of power received from any other source.

2. PUD contends that certain Denver employees of the Bureau of Reclamation improperly participated in designing the plans submitted by Seattle and that one of the federal employees improperly testified on Seattle's behalf at the Commission hearings. It argues that all evidence resulting from these activities should have been excluded by the Commission and that, because it was not, the license must be set aside.[7]

The activities which PUD challenges constituted so-called "sun-downing" by Bureau of Reclamation engineers, *i.e.*, working on a second job during off-hours. This practice was apparently common among the Bureau's engineers, whose competence in reclamation, dam construction, and hydroelectric projects had created a wide demand for their off-duty professional services. Although the practice was understandable from the standpoint of both the outside employer and the employee, it was, in our view, a practice subject to abuse. We note also that the Department of Interior, on January 26, 1959, terminated this practice on the part of its high-level engineers by forbidding "all outside work for grades above GS–11" (J.A. 201, 212).

The view which we hold—that the practice in question was subject to abuse—does not answer the question whether the services performed by the federal employees vitiate the license which PUD is challenging. In assessing this issue, it is, of course, to be borne in mind that neither the Federal Power Commission nor any of its staff had any connection with the performance of technical services on behalf of

[7] It is also argued, for the same reason, that Seattle should have been disqualified as an applicant.

Seattle. PUD argues that the activities of the Bureau of Reclamation Denver employees violated former 18 U.S.C. 281. But whether or not there was a violation [8] is discrete from the question whether there was any prejudice to PUD which would justify or require the invalidation of Seattle's license.

Former Section 281 provides for criminal penalties; it does not imply that, whenever a violation has occurred, all licenses, contracts and the like are automatically voided. At the least, we submit, a license is not void when there is no indication that it resulted from influence brought to bear upon the responsible government officials—the primary evil which the statute was intended to prevent. *Burton* v. *United States*, 202 U.S. 344, 368; *United States* v. *Adams*, 115 F. Supp. 731, 734 (D. N.D.); 42 Op. A.G. No. 6, pp. 9–10 (1962); Cong. Globe, 38th Cong., 1st Sess., pp. 555–562. As the court of appeals held (Pet. App. B, p. 5):

> We find nothing in the record to indicate that there was here the "influence peddling" at which § 281 was aimed. No corrupt or venal motive is shown on the part of Seattle or the Bureau of Reclamation engineers, and it does not appear that the Commission gave any more

[8] The Department of Justice, after an investigation, concluded that criminal prosecution was not justified. See letter of Assistant Attorney General Wilkey to the Chairman of the Federal Power Commission, Appendix, *infra*, p. 24. This may have been because all of the engineers, except Winter, completed their work for Seattle before the application was filed with the Commission, and Winter's major activity for Seattle after that time—his testimony before the Commission—was not compensated for by Seattle.

> weight to the material furnished by the government employees than if it had been prepared by others. Moreover, § 281, a criminal statute, prescribed no civil or administrative sanctions. Even if it has been technically violated here, it does not follow that the grant of a license to Seattle should be set aside for that reason alone.

In short, it is sufficient for purposes of this case that the record demonstrates that neither the engineers nor Seattle was guilty of influence-peddling or any other corrupt or venal activities, and that the Commission's determination would not be influenced by the activities in which the employees had engaged.

The facts and circumstances relating to the performance of technical services by Bureau of Reclamation engineers were carefully sifted by a hearing examiner and the Commission (both on PUD's exceptions and on its application for rehearing). They were reviewed by the court of appeals. None of these tribunals found the slightest possibility of the undue influence at which the statute is aimed. It is plain on this record that none could be found. The Bureau engineers were not retained by the Savage firm because they were employees of the government; indeed, many of their fellow technicans on the project were not. They were retained because the firm was in need of additional men who could perform highly specialized technical work. Indeed, but for PUD itself, the record does not indicate that the Commission would have been aware that any government engineer except Ireal Winter (who testified) had

participated in the project's design. Winter's testimony concerned only technical power aspects of the project, which were not the subject of substantial conflict between Seattle and PUD. And the Commission did not hesitate to reject Winter's chief contribution in favor of the Hill-Ayres plans. See *supra*, p. 9.

Nor was there any likelihood that the engineers employed by Savage would influence the position of the Department of Interior as a whole or the Bureau of Reclamation in particular. The Department of Interior's only real question as to the Seattle proposal was the concern of the Bureau of Mines and Geological Survey that there be no mine damage. This issue had no connection either with the work of the government engineers on Seattle's design or with the work of the Bureau of Reclamation. That agency was not concerned with the technical design of the project, which is outside its jurisdiction; under its 1949 agreement with the Corps of Engineers it was not even concerned with the presence of hydroelectric facilities on the Pend Oreille, so long as the reclamation potential of the Clark Fork was preserved.

In these circumstances, there was no need for the Commission either to ignore evidence relating to the work of the government's engineers or to exclude Winter's testimony. The Commission had a right to consider this and the other relevant technical evidence which could assist it in deciding which of the competing applications would best serve the growing power requirements of the Northwest, particularly when it carefully considered the facts surrounding

the origin and development of that evidence. Such questions of admissibility are, within broad limits, for it to decide in the light of the purposes of the statutes it administers.

PUD relies heavily on *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520. There, a government employee, who was also employed by a private company, participated in contract negotiations involving a proposal by another private company. Acceptance by the government would have put the employee in a position to profit personally. Without knowledge of the employee's dual status, the contracting agency accepted the proposal. When it subsequently learned the true facts, it repudiated the agreement. This Court, in sustaining this repudiation, held that the facts disclosed a strong likelihood that the government employee might be tempted to advance his private interests over the government's—which were precisely the circumstances the statute (former 18 U.S.C. 434) was intended to cover.

Mississippi Valley is plainly not in conflict with the holding below. First, the Court held in that case that the government could repudiate the contract; it did not remotely suggest that the contract was totally void or that the government would have been precluded from adhering to it if it had been in the public interest to do so. Second, the facts in *Mississippi Valley* are quite different from those in the case at bar. Here, there was no conduct which created the evil—undue influence—which Section 281 was designed to prevent. There are no circumstances which cast doubt upon the essential integrity of the

proceedings. The Commission could properly determine, consistently with the *Mississippi Valley* case, that, on the basis of all the facts, the public interest was best served by hearing all the relevant testimony and granting the license to Seattle.

We point out further that, after the decision below, Congress enacted a revision of the federal conflict-of-interest and related laws. 18 U.S.C. 201–218 (approved October 23, 1962; effective January 21, 1963). In Section 203, *supra,* p. 2, note 2, it reenacted the substance of Section 281, the provisions invoked by petitioner. See S. Rep. No. 2213, 87th Cong., 2d Sess., pp. 9–10. It also added Section 218—"which has no statutory counterpart at the present time" (*id.* at p. 15)—providing:

> In addition to other remedies provided by law the President or, under regulations prescribed by him, the head of any department or agency involved, may declare void and rescind any * * * license * * * awarded * * * by or for any agency of the United States * * * in relation to which there has been a final conviction for any violation of this chapter * * *.

This provision obviously permits rescission but does not require it even where a criminal conviction has been obtained. Thus, the policy of this statute is entirely in keeping with the decision below.

In the circumstances presented, the only effect of adopting PUD's position would be to deprive the public, for a further extended period of time, of the benefits of a hydroelectric project which is urgently needed.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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JANUARY 1963.

APPENDIX

Assistant Attorney General
Criminal Division

DEPARTMENT OF JUSTICE
Washington

April 12, 19

Honorable JEROME K. KUYKENDALL
Chairman, Federal Power Commission
Washington, D.C.

DEAR MR. KUYKENDALL:

Recently this Division completed a review of fa
data gathered by the Federal Bureau of Inves
tion and the Branch of Investigation, Departme
the Interior relative to allegations of possible v
tions of Federal criminal statutes by certain pe
associated with the design of the Boundary Pr
proposed for construction on a reach of the
Oreille River in the State of Washington by the
of Seattle. Investigation was initiated upon ref
of this matter to the Attorney General by you
Secretary of the Interior and Representative
Taber.

Our review, which included a study of possible
lation of the criminal statutes within the purvie
this Division by those associated with the Depart
of the Interior as well as those associated wit
City of Seattle Lighting Department, Seattle, W
ington, indicated that the facts presented would
support a successful criminal prosecution.

Sincerely,

/s/ Malcolm Richard Wilkey
MALCOLM RICHARD WILKEY,
Assistant Attorney Gener

[1] A copy of this letter was filed with the court of appe

U.S. GOVERNMENT PRINTING OFFICE: 19

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CASES CITED

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Federal Power Act, 16 U.S.C. §§ 791a-823:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 611

PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY, WASHINGTON, *Petitioner*

v.

FEDERAL POWER COMMISSION, and CITY OF SEATTLE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONER'S REPLY

The responses underscore the importance of this Court's granting certiorari to review both the state law issues and the conflict of interest issues. These are issues which this Court never has passed upon. In no previous case has this Court decided whether the Federal Power Commission, by granting a license,

may confer on a city the power to condemn another municipality's electric properties when the state legislature, in regulating the relationship between its own municipalities, has expressly prohibited the city from resorting to such use of eminent domain. Nor did this Court ever before have occasion to determine whether a litigant's serious violations of the federal conflict of interest laws shall be condoned merely because corruption, venality or influence-peddling has not been affirmatively proved.

Nothing in the responses filed by the Government and by Seattle can obscure the fact that these are issues with an impact extending far beyond this particular case. Both responses, moreover, are notable for their failure to address themselves squarely to the real questions presented.

I. AS TO THE STATE LAW ISSUES

A. State Court Case Now Set for Trial on March 4, 1963

Pursuant to the Washington Supreme Court's remittitur in *Beezer* v. *City of Seattle* (Petition, Appendixes C and D), the interpretation of state law as applied to petitioner's properties in this case is now set for trial in the state trial court on March 4, 1963—despite Seattle's efforts at delay. That trial is to determine whether, within the Washington statute's meaning, petitioner's properties are electric properties and hence are properties which the State expressly has prohibited Seattle from condemning. The state courts are the appropriate forum for adjudicating such issues. Indeed, they constitute the only forum where an authoritative adjudication can be obtained.

B. Conflict Between Beezer and Court of Appeals Requires Review

FPC expressly abstained from making any determination of these state law issues (S.J.A. 316; see Petition, p. 8). But the Court of Appeals nevertheless went ahead to inject a view of its own that petitioner's properties are not a part of petitioner's electric system and therefore do not come within the prohibitory Washington statute (Petition, p. B-9). This it accomplished—as our Petition (pp. 10, 24) has shown—by totally disregarding the *Beezer* decision in which the Washington Supreme Court had just ruled that these precise issues must proceed to trial in the state court. A direct conflict results between the Court of Appeals and the *Beezer* decision, requiring review by this Court.

The Government (Br. Opp., p. 16), characterizing the Court of Appeals comments on the state law issues as "merely an alternative ground of decision", now says that "whatever differences may exist" on these state law issues between the views of the Washington Supreme Court in *Beezer* and the views of the Court of Appeals in this case "do not justify review by this Court". But the direct conflict of these decisions makes such review imperative.

The problem is a fundamental one of distribution of functions as between the federal and the state courts, and indeed of usurpation of power by the Court of Appeals. The Court of Appeals refused to await the state court determination; and it dealt erroneously with the merits of state law issues which FPC expressly left open and which the state court is on the verge of adjudicating. This the Court of Appeals did in plain

conflict with the Washington Supreme Court's opinion and action in *Beezer*.[1]

The Government (Br. Opp., p. 22) and Seattle (Br. Opp., p. 13) both stress the desirability of bringing to a close the litigation in which these competing proposals for projects have become enmeshed. It is at least equally important that the fundamental questions presented by the litigation be resolved correctly. And in any event, if certiorari were denied and the Court of Appeals opinion remained without the benefit of a review on the merits by this Court, the ultimate effect might well be to lengthen rather than to shorten the litigation.

C. Total Inapplicability of Cases Cited by Respondents

The Government's main argument (Br. Opp., pp. 11-15) on the state law issues is that the Court of Appeals was correct in holding that the State of Washington cannot effectively prohibit its own municipality (Seattle) from condemning petitioner's electric prop-

[1] The Government also records in a footnote (Br. Opp., p. 16, note 6) its belief ("we believe") that state law, if applicable, "would not have prevented Seattle's exercise of eminent domain" because the statutory provision relied on by petitioner "is merely a *limitation* on a grant of eminent domain power made by the State" and "does not even purport to forbid the exercise of power received from any other source." Even if the Government's suggested interpretation of the Washington statute were less highly implausible than it actually is, it would at best be a reflection of the Government's current speculations on the subject of Washington law. It would in no way be an adequate substitute for the authoritative judicial determination which the Washington Supreme Court has directed to be made by trial of the issues in the state court. Moreover, if the Washington Supreme Court had agreed with the Government's far-fetched suggestion as to the Washington statute's meaning, then there would have been no occasion for the Washington Supreme Court to take the action it did take in remanding the *Beezer* case for trial.

erties. The Government claims that, despite the prohibitory Washington statute, Section 21 of the Federal Power Act gives Seattle power to override the State statute regardless of what the statute provides, "simply because it is a federal licensee". Seattle makes a similar claim. Our Petition (pp. 16-22) has shown that this ruling of the Court of Appeals is in conflict with holdings of the Washington Supreme Court, that it misinterprets this Court's *Tacoma* decision, and that it raises grave constitutional questions as to the power of the States to restrict the activities of their own municipal subdivisions.

The cases cited by the Government (and those cited by Seattle as well) in no way contradict this analysis. Moreover, they make it clear that the important issues raised in this proceeding have never been passed upon by this Court, and that both the Government and Seattle are seriously confused concerning the issues actually presented here.

The Government's strong reliance (Br. Opp., p. 13) on *Kohl* v. *United States*, 91 U.S. 367, 374, and decisions stemming from it, is wholly wide of the mark. For *Kohl* involved a condemnation proceeding brought by the Federal Government itself to condemn land located within a State and intended for use as a United States post office. But Seattle is not the United States; nor would Seattle here condemn property for the use of the United States. Seattle is a city of the State of Washington, prohibited by its creator from condemning electric properties of Washington public utility districts. *Kohl* has nothing at all in common with the problem presented by this case—namely, whether a State is, or constitutionally may be, ousted by the Federal Power Act or by the Federal Power Com-

mission from the State's normal jurisdiction to enforce its sovereign control over its own municipalities. The same is true of the Government's reference (Br. Opp., p. 13) to *United States* v. *Carmack*, 329 U.S. 230—another instance where the United States was condemning a post office site for its own use and where the Court's statement that state laws cannot restrict that right has no possible application to the issues in this case.

The *First Iowa* and the *State of Washington Department of Game* decisions, as our Petition (pp. 21-22) has shown, involved state "veto" laws bearing no resemblance to the Washington statute present here; thus the respondents' heavy reliance (Government Br. Opp., pp. 13-15, and Seattle Br. Opp., pp. 13-17, 24) on these decisions is totally misplaced.

First Iowa involved a state law which forbade the construction of a dam in a navigable stream without a permit from a State executive council; quite naturally, this Court (328 U.S. at 164) held the state law to be a "veto" law which was superseded by the Federal Power Act. In the present case, however, the Washington statute makes no reference to a dam or a navigable river. It simply prohibits a city (here Seattle) from condemning the electric properties of a public utility district—properties which in this case petitioner acquired before Seattle applied for a license. The Government (Br. Opp., p. 14) quotes from *First Iowa*, 328 U.S. at 177, to the effect that Section 9(b) of the Federal Power Act "does not itself require compliance with any state laws". But the Government neglects to refer to what this Court said later in the same paragraph, namely (328 U.S. at 178): "The need for compliance with applicable state laws, if any, arises

not from this federal statute but from the effectiveness of the state statutes themselves." And as our Petition (pp. 20-21) demonstrates, there is virtually no state law which could have a greater "effectiveness" than a statute by which the State fixes and controls the powers and relationships of its own municipal corporations, one against the other.

Similarly, in connection with the *State of Washington Department of Game* case the Government's quotation (Br. Opp., p. 13) is entirely misleading, because it omits the part of the Ninth Circuit's opinion which might have some bearing here. Immediately following what the Government quotes, namely, "state laws cannot prevent the Federal Power Commission from issuing a license or bar the licensee from acting under the license to build a dam on a navigable stream", the Ninth Circuit's opinion continues (207 F. 2d at 396):

> "However, we do not touch the question as to the legal capacity of the City of Tacoma to initiate and act under the license once it is granted. There may be limitations in the City Charter, for instance, as to indebtedness limitations. Questions of this nature may be inquired into by the Commission as relevant to the practicability of the plan, but the Commission has no power to adjudicate them."

In marked contrast to the three state laws[2] which the Ninth Circuit expressly passed upon in the *State of*

---

[2] These were, respectively, (1) a requirement that, in connection with the construction of a dam in a navigable stream; a permit for the diversion of water be obtained from the State Supervisor of Hydraulics; (2) a similar requirement that written approval as to plans and specifications be obtained from the State Director of Fish and Game; and (3) a requirement that dams in the Cowlitz River be limited to the 25-foot maximum height which the State legislature had established. All three of these requirements were clearly in the nature of "veto" laws, within the meaning of this Court's *First Iowa* decision.

Washington Department of Game case, here the Washington statute is not a "veto" law whereby the State has sought to block a federally-licensed project on the Pend Oreille river. The Washington statute does not refer to navigable streams, nor does it establish limitations on the licensing of dams on navigable streams. Rather, the Washington statute is an express prohibition which the State has imposed upon Seattle's charter, depriving Seattle and other cities of the legal capacity to condemn electric properties of public utility districts.

On this phase of the case the respondents' final irrelevance is their reliance on *United States* v. *Tuscarora Indian Nation;* 362 U.S. 99. The *Tuscarora* decision did not involve any question whatsoever of a prohibitory state law. *Tuscarora* is notable, moreover, for the great care with which this Court considered whether there was any federal law or policy which stood in the way of a licensee's using Section 21 of the Federal Power Act to take property of the tribe by eminent domain.

D. No Dual Standard

The Government complains (Br. Opp., pp. 12-13) that petitioner's contention would result in "a kind of dual standard, with one power under Section 21 for private corporations and another for municipal corporations". This again shows confusion as to the issue.

Petitioner does not contend for a dual standard under Section 21. Rather, petitioner's position is that to the extent that the state statute has fixed and limited Seattle's use of eminent domain against petitioner's electric properties, nothing the FPC can do can repeal or override that limitation. The root of the trouble is

that in this case FPC has chosen Seattle as a licensee wholly without regard to whether, under the State's prohibition on its charter, Seattle could carry out the terms of its license.

E. State's Sovereign Control of Its Municipalities

As our Petition (p. 20) has shown, the whole thrust of American constitutional development confirms a State's authority to control and limit activities of its own municipalities. Under the Constitution and the Federal Power Act, if properly interpreted and applied, the State of Washington is entitled to full recognition of the express statutory prohibition which it has deliberately imposed on Seattle's authority. If the State of Washington chooses to prohibit its own municipality Seattle from taking eminent domain actions which would be necessary before Seattle could carry out this proposed hydroelectric project in a distant sector of the State, the State's policy must prevail. This Court has never given the slightest intimation that Section 21 of the Federal Power Act should be interpreted to override a state statute of this type.

II. AS TO THE CONFLICT OF INTEREST ISSUES

A. Fundamental Issues as to Conflict of Interest Laws

The Government's response highlights the urgent need for this Court to make a full review of the conflict of interest issues. For one thing, the Government has now given the weight of its endorsement to the unsupportable Court of Appeals decision that, as applied to evidence and witnesses in a federal administrative proceeding, the prohibitions of the conflict of interest laws may be disregarded unless corruption, venality or influence-peddling is affirmatively proved. For another thing, the Government's response shows how much

this case revolves around the fundamental question whether the conflict of interest laws should be applied in a proceeding involving other litigants just as vigorously and as firmly as the conflict of interest laws would be applied in a proceeding to which the United States is a formal party.

The Government now at least acknowledges (Br. Opp., p. 17) that the practice of regular federal employees of the Bureau of Reclamation hiring themselves out to render services to a contestant in a proceeding in which the Government has an interest "was, in our view, a practice subject to abuse". But the Government apparently takes the position that nobody except the Government itself has a right to complain about having been the victim of such abuse.

This is far too narrow a view of the federal conflict of interest statutes and policies. That the Government has an obligation to enforce those statutes and policies so as to safeguard the interests of the United States is uncontestable. But regardless of whether the Government meets this obligation or neglects to do so, those statutes and policies stand equally as a bulwark of protection for the rights of others. This is a basic issue, both novel and important, which the present case raises.

A litigant in a contested federal proceeding who discovers that his opponent has pursued the precise course of conduct which the conflict of interest laws forbid certainly cannot be left without a remedy merely because the Government, through somnolence or otherwise, has failed to assert the obvious objections. The Court of Appeals decision to the contrary is a precedent unusual for its laxity and capable of enormous harm to the public interest.

B. The Government's Misleading Account of the Conflict of Interest Issues

The Government's description of the conflict of interest aspects of the case is highly misleading in material respects. This misleading account the Government has used as its basis for drawing conclusions at least equally erroneous. For example:

1. The Government says (Br. Opp., p. 10) that it was "after the hearings—long after the government engineers [hired by Seattle] had finished their technical work" that "the Bureau of Mines and the United States Geological Survey took a position opposing any project on this stretch of the Pend Oreille". But as the record shows (J.A. 144) and as our Petition (pp. 11-12) points out, the Interior Department had opposed Seattle's proposed Boundary project and had so notified FPC at least as early as July 1, 1954—more than four years before the hearings in this case opened and more than a year before Seattle hired Winter and the other full-time Bureau of Reclamation employees to do this work. Thus when Seattle embarked on its unlawful course of conduct by hiring Winter and the other Interior Department employees to work for Seattle in connection with Seattle's preparations for this FPC proceeding, the hostile attitude of the Interior Department toward Seattle's project was already well known and a matter of public record.

2. In these actual circumstances—instead of the somewhat fictitious circumstances suggested by the Government—there might be abundant temptation to such an applicant to hire reputable and well-known Interior Department employees in the hope of softening or diluting or even overcoming Interior Department resistance. Whether in fact such factors were a

motivating force in this particular case has been made irrelevant by the broad statutory policy which Congress expressed in the conflict of interest laws. As our Petition (pp. 27-30) shows, Congress outlawed a whole class of conduct so that such *ad hoc* factual inquiries—which at best may be difficult to pursue and uncertain to resolve—would not have to be made on a case-by-case basis.

3. The Government claims (Br. Opp., p. 19) that "the record demonstrates that neither the engineers nor Seattle was guilty of influence-peddling or any other corrupt or venal activities, and that the Commission's determination would not be influenced by the activities in which the employees had engaged." As we have shown, the conflict-of-interest laws prohibit Seattle's course of conduct regardless of whether any such specific occurrence is affirmatively proved. The Government's effort to excuse the conflict of interest violations on such grounds is comparable to the Court of Appeals' minimizing them as merely a "technical violation". Previous to the Court of Appeals decision here, no court has ever indulged in such lax interpretation of the conflict of interest laws. In *Burton* and in *Dixon-Yates*, as the Petition (pp. 25-29) sets forth, this Court applied and enforced standards which are far more rigorous. These standards should be applied and enforced with equal vigor when a litigant, in a contested proceeding in which the Government has substantial direct interests, has hired Government employees to prepare and to testify in support of the litigant's case.

4. What the Government asserts is seriously misleading for other reasons as well. The record in no way "demonstrates" the absence of influence-peddling

or corrupt or venal activities; it merely does not demonstrate whether any such activities occurred or not. On these phases of the case, moreover, the record is incomplete, and through no fault of petitioner's. Petitioner's efforts to subpoena two high officials of the Interior Department, in order to obtain for the record all the pertinent facts relating to the conflict of interest violations (including facts as to *ex parte* representations made by Seattle to the Interior Department) were rebuffed, and petitioner's applications for the subpoenas were denied (Petition, pp. 5, 15). And again contrary to the Government's suggestion, no one now will ever be able to tell the extent to which FPC, whether consciously or unconsciously, may have been "influenced by the activities in which the employees had engaged".

5. The Government is completely in error in stating (Br. Opp., p. 20) that "Winter's testimony concerned only technical power aspects of the project, which were not the subject of substantial conflict between Seattle and PUD [petitioner]". First, the record shows that even the "technical power aspects" covered by Winter's testimony were the source of substantial conflict between Seattle and petitioner.[3] Second, and perhaps

[3] For example, Winter testified on the comparative merits of Seattle's and petitioner's proposed projects (Tr. 1120-1121); he was cross examined extensively on this (Tr. 1135-1141); and petitioner introduced considerable expert testimony in rebuttal of what Winter had said (Tr. 2508-2613). Indeed, Winter testified on direct examination that his responsibilities included "the development of the potentialities of this reach of the Pend Oreille river, considering the costs and the engineering feasibility of the sites which might be selected" (J.A. 54); and Winter admitted on cross examination (J.A. 73) that his services for Seattle included work on the "comparative project and energy costs" in issue in the hearing.

even more critical, is the fact that, over petitioner's strenuous objections, Winter as Seattle's witness was permitted to testify to the ultimate finding which FPC is required to make under the Federal Power Act and to express his opinion that Seattle's Boundary project, as a power site, is the best site for developing the full potentiality of this stretch of the Pend Oreille river (Tr. 869 and J.A. 57-58; see Petition, p. 14). Particularly in view of the examiner's finding that Winter's qualifications were "most impressive" and the examiner's extensive reliance on the work Seattle had paid Winter and the other Bureau of Reclamation employees to perform (Petition, p. 15), the prejudice to petitioner was severe.

6. The Government (Br. Opp., pp. 9, 20), somewhat like Seattle (Br. Opp., pp. 21-22), intimates that the final Seattle plan as approved by FPC was so different from the original Seattle proposal that it involved a "rejection" of "Winter's chief contribution". But the record shows that the final Seattle design was simply the Winter power plant shifted to an underground location (J.A. 118; Tr. 4322-4344). Seattle's "composite plan", as finally approved by FPC, consists of this Winter power plant moved underground, plus the thin-arch dam which was part of Seattle's original plan and which was designed for Seattle by the other regular Bureau of Reclamation employees whom Seattle hired. Indeed, when Seattle's initial estimates showed that Seattle's project would be a less economic development than petitioner's project, Seattle was permitted over petitioner's objection (Tr. 4014-4017, 4330) to introduce these amendments to its plan, accompanied by lower cost estimates, to support Winter's testimony that Seattle's project and not

petitioner's would afford the best development of this stretch of the river. Accordingly, nothing in the record justifies a suggestion that the case can be considered as if the grounds of FPC's decision had been wholly separated and insulated from Seattle's tainted evidence reflecting the important work which Seattle hired Winter and the other regular Bureau of Reclamation employees to perform in violation of the conflict of interest laws and policy.

7. The Government says (Br. Opp., p. 19) that the Bureau of Reclamation engineers "were not retained . . . because they were employees of the government". This is something like saying that the defendant in *Burton* v. *United States*, 202 U.S. 344, was not retained because he was a United States Senator.

CONCLUSION

For these reasons, as well as for the reasons set forth in the Petition, certiorari should be granted.

Respectfully submitted,

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February 7, 1963

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No. 611.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY, WASHINGTON, *Petitioner*

v.

FEDERAL POWER COMMISSION, and CITY OF SEATTLE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

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March 8, 1963

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 611

PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY, WASHINGTON, *Petitioner*

v.

FEDERAL POWER COMMISSION, and CITY OF SEATTLE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

On the grounds set forth below, petitioner requests rehearing of this Court's order of February 18, 1963, denying certiorari.

1. *New Developments in State Court Case.* We previously informed this Court that the *Beezer* case—which would determine definitively whether, under the Washington state statute, petitioner's properties are electric properties which Seattle is forbidden to condemn—was set for trial in the state court on March 4,

1963 (see Petition, Appendixes C and D, and Petitioner's Reply, p. 2). Subsequent to this Court's denial of certiorari in the present case, however, Seattle filed in the state court a motion to dismiss the *Beezer* case, based solely on the ground that this Court's denial of certiorari here had made *Beezer* moot. Petitioner has filed in the state court a memorandum in opposition to Seattle's motion. Petitioner's memorandum takes the position that the District of Columbia Circuit's decision here and the denial of certiorari do not and cannot interfere with the rightful jurisdiction of the state courts to determine whether Seattle would be exceeding its powers if Seattle proceeded to condemn petitioner's properties despite the Washington statute's affirmative prohibition.

The state trial judge now has deferred consideration of Seattle's motion, and of petitioner's opposition thereto, until petitioner shall have filed and this Court shall have acted upon the present petition for rehearing.

These circumstances strongly emphasize the nature of the misunderstandings which, in the state court litigation, may be a consequence of the denial of certiorari. In effect, such litigation may well be prolonged because of the unresolved conflicting contentions and inferences as to the precise issues which the federal proceedings do and do not resolve.

2. *Conflict of Decisions between Ninth Circuit and District of Columbia Circuit.* These circumstances likewise emphasize the gravity of the conflict between the District of Columbia Circuit's opinion here and that of the Ninth Circuit in *State of Washington Dept. of Game* v. *Federal Power Comm'n*, 207 F. 2d 391.

(1953), certiorari denied, 347 U.S. 936, concerning a major constitutional issue heretofore undecided by this Court.

In the latter case the Ninth Circuit declared that the Federal Power Commission had no authority to "adjudicate" the effect of the limitations on the powers of a city, as a licensee of the Commission, to initiate necessary action under its charter. The Ninth Circuit held that the decision of the Federal Power Commission was final as to the issuance of the license but that the legal capacity to act under the license, once granted, would be subject to any applicable limitations of state law which the Commission has "no power to adjudicate."

The Ninth Circuit opinion reads in part (207 F. 2d at 396):

> "However, we do not touch the question as to the legal capacity of the City of Tacoma to *initiate and act* under the license once it is granted. There may be limitations in the City Charter, for instance, as to indebtedness limitations. Questions of this nature may be inquired into by the Commission as relevant to the practicability of the plan, *but the Commission has no power to adjudicate them.*" [Emphasis supplied] (citing *City of Tacoma* v. *Taxpayers*, No. 32411, 43 Wash. 2d, 468, 262 P. 2d 214, which was then pending before the Supreme Court of Washington)

By citing the above state court case the Ninth Circuit recognizes state limitations on the power of municipalities to be controlling.

Thus the Ninth Circuit opinion declared that the state law fixes and limits the powers of a city even

when the city is a licensee of the Federal Power Commission. Certiorari was denied.

In the present case, on the other hand, the District of Columbia Circuit has said that state law "cannot make it impossible for Seattle as a federal licensee to condemn under the federal statute" (Petition, p. B-9). Here again, certiorari has been denied.

Hence it plainly appears that the Ninth Circuit unqualifiedly held that the capacity to act under a federal license is subject to the licensee's disabilities under state laws, whereas the District of Columbia Circuit asserts exactly the contrary.

3. *Conflict as to the Law to be Applied to this Project.* The confusing situation left wholly unresolved by the denial of certiorari would by no means be confined to the *Beezer* case pending in the state courts. In addition, when Seattle brings condemnation proceedings in a federal district court in the State of Washington to condemn petitioner's properties, the federal district court will be bound to follow and apply the law as it has been declared by the Ninth Circuit. Hence such condemnation proceedings will be controlled by the state statute which prohibits a city from condemning any part of the electric system of a public utility district. This makes it imperative that the state court, in the *Beezer* case now pending shall first decide whether or not the properties of petitioner are such properties as the Washington statute has forbidden Seattle to condemn.

The major issue of constitutional and statutory interpretation is whether Congress can empower—or ever intended to empower—a municipal corporation, which is merely a subordinate political subdivision of

a state, to do that which the parent state has expressly prohibited the municipality from doing. This issue has not heretofore been decided by this Court in this context, but the principle involved is one on which this Court has expressed itself in favor of petitioner's position, in *Dallemagne* v. *Moisan*, 197 U.S. 169, 174:

> "It has long been held that power may be conferred upon a state officer, as such, to execute a duty imposed under an Act of Congress, and the officer may execute the same, *unless its execution is prohibited by the Constitution or legislation of the State.*" [emphasis added]

Resolution of the conflict between the Ninth Circuit and the District of Columbia Circuit is imperative to determine the proper allocation of functions between the Federal Government and the States. It likewise has great practical importance as a means for removing uncertainties that threaten to prolong the litigation relating to the competing efforts to build a new hydroelectric project on this stretch of the Pend Oreille river. Exceptionally compelling reasons thus exist for granting certiorari and resolving the conflict between the two circuits.

CONCLUSION

On the grounds here set forth—as well as those previously urged—rehearing should be granted, the order of February 18, 1963, denying certiorari should be vacated, and certiorari should be granted. Moreover, since the *Beezer* case is ready for trial in the state court, a definitive determination on the state law question can easily be available to this Court before the present case would be reached for argument in normal course if certiorari is granted now. Accord-

ingly, the granting of certiorari at this time will enable this Court to do what the Court of Appeals improvidently failed to do—namely, to have before it a definitive interpretation of the state law question on which the major constitutional issue turns.

Respectfully submitted,

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March 8, 1963

CERTIFICATE OF COUNSEL

Pursuant to Rule 58, I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in paragraph 2 of Rule 58.

BENNETT BOSKEY